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THE COUNTY COURTS CONSOLIDATION ACT, 1888.

THE County Courts Consolidation Bill, after several miscarriages, has at length struggled into legal being as the County Courts Consolidation and Amendment Act, 1888. It probably owes its statutory existence to a wise reform initiated by Lord Selborne, who made the office of Principal Secretary to the Lord Chancellor a permanent one. The obvious object of this reform was to give some chance of continuity to the legal policy of successive Lord Chancellors, and to create what might be the nucleus of a department of Law and Justice. Any one acquainted with the working of a public office must be aware of the wholesale confusion which would result if the staff was changed with every change of government. The hitherto backward state of all non-contentious law reform in this country has probably been due in no small degree to the absence of any body of permanent officials charged with its supervision.

The County Courts Bill was introduced in the House of Lords this year as a purely consolidating enactment. On this footing it was allowed to pass that House without amendment or debate. When it reached the House of Commons, Mr. Henry Fowler gave notice that he should object to its further progress until the House had had the opportunity of considering it on its merits. The Government thereupon consented to its being referred to the Standing Committee on Law. The Bill was considered clause by clause in Committee, and was amended in several minor details, all the amendments I think being of useful tendency. Two questions of general importance were also raised—namely, the jurisdiction of the Courts and the status of the Registrars. The exclusive jurisdiction was strengthened, and a somewhat increased concurrent jurisdiction was conferred on the Courts. Mr. Fowler also made a

gallant but unsuccessful attempt to settle the question of jurisdiction once for all on a logical and permanent basis. His proposed amendment, which I shall discuss hereafter, was accepted by the Government, but was defeated by a small majority in a very thinly attended meeting of the Committee. As regards the status of the Registrars, Mr. Fowler scored a partial success, which I propose to discuss when I come to consider the merits of the system perpetuated by the new Act. Unfortunately, after the Bill had passed the Standing Committee it was for some time laid aside. At the close of the session it was read a third time without substantial amendment or debate, and there was only just time to hurry it through the Lords without further consideration. The Lord Chancellor complained somewhat bitterly that a Bill, which had been introduced in and passed through the Lords as a mere consolidation Bill, had been altered in substance in the Commons, and then returned so late to the Lords that there was no possibility of discussing or considering the Commons' amendments without sacrificing the measure for the Session. There can be no question that his protest was well founded, and that if the Bill could have been considered in the Lords it could not have failed to have been improved thereby. The criticisms of the Lord Chancellor, and of Lords Selborne, Herschell, and Bramwell, on a measure of this kind would have been invaluable. However, it is to be hoped that before long their criticisms may be obtained on an amending Bill. Until the millennium arrives, finality in legislation is neither possible nor desirable. No doubt the most convenient course is to amend first and consolidate afterwards. But when this course is not open, the next best plan is to consolidate first and amend afterwards. It is always much easier to amend a consolidation Act than to amend the confused mass of enactments which it supersedes. As far as I know, the only persons injured by the amendment of a consolidation Act are the compilers of law books, but I take it their interests are subordinate to those of the community at large.

The new Act may be viewed in two aspects, namely, as it affects the form of the law, and as it affects the substance of the law. Regarded as a consolidation Act, it may safely be pronounced a success. It gets rid of some thirteen heterogeneous enactments, speaking from different times and with discordant voices. Its arrangement is lucid, its language is intelligible, and it appears originally to have been well and carefully drafted. It might perhaps have been made more complete. There appears to be no reason why the two Admiralty County Courts Acts should not have been included in it. Again, sect. 17 of the Judicature Act, 1884 (power to remit interpleaders to County Courts), would properly be included in a

County Courts Act. Its logical place would be after section 66 of the new Act. On the other hand, the statute re-enacts certain provisions relating to details of practice which had better have been omitted, inasmuch as they could be adequately regulated by the more flexible machinery of Rules of Court. For instance, the question of payment into Court might well have been left to be dealt with by Rules, as it is in the High Court. The draftsman of course was bound to reproduce these provisions in the Bill, but they should have been dropped in Committee.

Turning now to the merits of the system perpetuated by the new Act, there is much more scope for criticism. The jurisdiction of the County Courts is anomalous in the extreme. Perhaps the capricious way in which the Legislature has dealt with this question is best indicated by a rough tabular statement:—

SUBJECT-MATTER.	PECUNIARY LIMIT.
Common law action with written consent of both parties	Unlimited.
Action founded on Contract (except for breach of promise of marriage)	£50.
Action founded on Tort (except libel, slander, and seduction)	£50.
Counter-claim (unless plaintiff gives written notice of objection)	Unlimited.
Ejectment or questions of title to realty	£50 annual value.
Equity Jurisdiction	£500.
Probate Jurisdiction	£200 personalty and £300 realty.
Admiralty Jurisdiction	£300.
Bankruptcy Jurisdiction	Unlimited.
Replevin	Unlimited.
Interpleaders transferred from High Court	£500.
Actions on Contract transferred from High Court	£100.
Actions on Tort transferred from High Court	Unlimited.

The only general principle to be deduced from the figures cited above is that the simpler an action is to try, the less jurisdiction the County Court has to deal with it. If the plaintiff wishes to sue on an ordinary bill of exchange in the County Court, he is severely limited to £50; but if he seeks to enforce specific performance of a contract, the Court has jurisdiction up to £500. The merits or demerits of a slanging match between two grooms must be decided on by a High Court judge, though the County Court judge can grant or withhold a discharge in bankruptcy. If the partners in a great bank (Greenways, for example) fail, the County Court winds up the estate; but if a little joint-stock bank fails, the County Court has no jurisdiction.

To remedy these anomalies, Mr. Henry Fowler brought forward a general clause (founded, I think, on a clause in one of Lord Selborne's Bills) which proposed to enact that any action or proceeding might be commenced in a County Court, but that when the County Court had not at present jurisdiction, the defendant might remove the matter as of right into the High Court. In other words, he proposed to give the County Court jurisdiction in any case where the plaintiff desired it and the defendant did not object. As I have said, the clause was negatived in Committee; but as the question may possibly be raised again hereafter, I propose to give the exact terms of the clause, and to consider shortly the objections which were successfully urged against it. The clause was as follows:—

'(1) Subject to the provisions hereinafter contained, any County Court included in any order made from time to time by the Lord Chancellor[1] in that behalf shall have jurisdiction to determine all causes or matters which can be commenced in the High Court, subject to such limitations as the order may impose.

'Provided always that any such cause or matter, which if this section had not passed could not have been heard or determined in a County Court, shall upon the application of any party be removed as of right into the High Court, in such manner as may for the time being be prescribed by Rules of the Supreme Court.

'Provided also that no order made or proceeding taken in such cause or matter prior to such removal shall be invalidated thereby, unless the High Court or a judge thereof shall otherwise order.

'(2) The Lord Chancellor may from time to time by order direct that any County Court shall be excluded from the exercise of such part of the jurisdiction conferred by this Act as the order may specify.

'(3) Any order made by the Lord Chancellor under this section may from time to time be by him varied or annulled.'

The main objections urged against this proposal were three in number. First, it was urged that, as a general rule, the County Court judges were not competent to exercise this increased jurisdiction. If that be so, a glance at the tabular statement given above seems to show that the Legislature has gone too far already. It may be said that this is no answer, for two wrongs do not make a right. It should however be borne in mind that in most cases the judge's work diminishes as the amount involved in an action increases. In a heavy case the work is done for him, in a small

[1] By the Act of 1883, following the Act of 1869, bankruptcy jurisdiction is given to or withheld from a County Court by the same machinery, namely the Lord Chancellor's order.

case he has to do it himself. If a case is carefully prepared and competent advocates are employed on each side, the judge has little to do but to sit still and listen. It is easy work for his head, though it may be hard work for the tails of his coat. There is not even the same amount of responsibility attaching to the decision, because he knows that any party who is dissatisfied can appeal as of right. Again, assume that the majority of the judges are not fit to exercise the increased jurisdiction. The public will soon find it out, and will cease to bring heavy actions before any judge whose competence they doubt. The clause is permissive, not obligatory. We have free trade in most things, why not have a little free trade in law? Put the case in the strongest possible form. If the public like to have their law cheap and nasty, why should they not be allowed to do so? In medical matters the great weight of professional opinion is against the system of homœopathy. Is that any reason for enacting that no one who is suffering from any ailment more serious than a cold in the head shall consult a homœopathic doctor? There is a further answer to the objection. In a heavy case the costs are much higher in the High Court than in the County Court, and litigation follows the scale of costs as surely as trade follows the flag. Unless there be some cogent reason, a solicitor will not commence an action in the County Court which he could bring in the High Court. In saying this I am casting no imputation on a solicitor who, in a proper case, prefers the High Court to the County Court. If the case will bear it, his preference is right. If he gets more money out of litigation in the High Court, it is because he does more work. The machinery of the High Court ensures a more elaborate investigation of his client's case and he obtains the decision of a more authoritative judge.

Secondly, it was urged against Mr. Fowler's clause that if such increased jurisdiction was given to the County Courts, the judges must have an increase of salary. Perhaps I can hardly be expected to feel the full force of this objection. At any rate I do not propose to discuss it. I would only remark in passing that the duties of the judges have been nearly doubled since their salaries were fixed on the present scale. When all the bankruptcy work of the country, outside London, was thrown upon the County Courts, no increase of salary was given; and I do not know why Mr. Fowler's clause should suddenly have aroused the sleeping conscience of the Legislature.

The third objection to the clause was a more serious one. It was said that the interpolation of heavy cases in ordinary County Court business would lead to the interests of small suitors being neglected. To some extent this evil already exists. But Mr. Fowler's clause

provided an adequate remedy. Under its provisions the extended jurisdiction would only have been conferred on such courts as the Lord Chancellor selected. The convenient course would be to give full jurisdiction to only one court in each of the fifty circuits outside London. The judge could always end up his month's work at that Court. After disposing of his ordinary business he could then sit *de die in diem* to deal with the heavier cases. Means of communication have much increased since the County Court system was instituted, and the creation of some fifty courts, with full powers, scattered about the country would meet all reasonable requirements. The policy of bringing justice home to the people, and holding a court in every artisan's back bedroom, may be carried too far. I should like to see a somewhat retrograde step taken. If the power to deal with cases over £20 were confined to the larger courts, that is to say to the courts which now have bankruptcy jurisdiction, it would I think be a public advantage. A heavy case is always tried at a disadvantage in one of the small courts. The judge probably is due at a distant court the next day, and must sit to an unreasonable hour to finish his work. If he takes the big case first, a lot of small people, who can ill afford it, are kept waiting. If he takes his small work first, he perhaps cannot begin his heavy case till a late hour. Counsel, jurymen, and witnesses are all tired with waiting and distracted with the notion that they will miss the last train. If a point of law arises, there is no library to which reference can be made. The court is usually held in some casual building peculiarly ill-adapted for the purpose, and everybody is suffering from conditions of physical discomfort which militate against the proper trial of the case. The parties are put to heavy expense in bringing counsel and skilled witnesses (if required) from a distance. The judge (wrongly perhaps) is a human being and not a machine, and the fact that he is wet, cold, tired, hungry, and generally uncomfortable, does not improve the quality of his work. Altogether the whole of the conditions under which the case is tried are unsatisfactory. A sharp dividing line ought to be drawn between the small-debt collecting business of the court and its really contentious business. Some of the very small courts ought to be abolished, or used only as district registries. All courts where the average number of plaints does not exceed 1000 ought to be made bi-monthly. The registrar might perhaps with advantage hold a monthly sitting to dispose of the undefended cases, and the cases under £2 where the parties consent to his jurisdiction. Defended cases over £20 ought to be sent for trial to the nearest convenient big town on the circuit. I believe if these suggestions were carried out the present staff of judges could not only cope

with the extra work likely to be thrown on them, but would also do their existing work better.

Another important question raised in Committee by Mr. Fowler was the status of the registrars. Before the new Act the registrars were paid by fees, but there was a Treasury order that no registrar should get more than £1400 a year. Salaries of over £1000 a year were reached, I think, in about fifty courts. There was no prohibition against registrars practising. As a consequence, the registrar in a very heavy court was worse off than the registrar of a medium-sized court, because he had less time for private practice. Again, it was, to say the least, anomalous that the registrar should get £1400 a year and be allowed private practice, while the judge got only £1500 a year and was strictly debarred from practice. The Government brought forward and carried a clause that in the case of the large courts the Lord Chancellor may make it a condition of any new appointment that the registrar shall not practise, but this prohibition is not to prevent him from holding any other public appointment. On the other hand, the registrar who is debarred from practice will very rightly come under the Civil Service rules as to pension. The duties of a registrar are such as to make it eminently undesirable that he should practise. He has to tax his brother solicitors' bills of costs. In bankruptcy and equity matters he has large judicial powers, and, if he be also a district registrar, he exercises the powers of a High Court Judge in chambers. If it would be objectionable for a Master of the Supreme Court or a Chief Clerk in the Chancery Division to be allowed to practise, it is equally objectionable in the case of a County Court Registrar. In the small courts it cannot perhaps be helped. The new Act preserves intact the system of salary dependent on fees. A registrar gets a minimum salary of £100 a year. Where the number of plaints exceeds 200 he gets an additional £4 for every 25 common-law plaints up to 6000, with a proviso that he is not to receive more than £700 a year for common-law business, exclusive of allowance for clerks. Mr. Fowler brought forward an amendment that the registrars should receive fixed salaries calculated on their receipts for the previous five years. But his proposal was unfortunately negatived. From a Treasury point of view there is a good deal to be said for the system of payment by results, but as a question of public morality the system is abominable. To put it plainly, the registrar's income in a small court is made largely dependent on the number of judgments he gives for the plaintiff. It speaks well for the high character of the registrars that the system has not given rise to wholesale scandals. A registrar, whom I know, told me not long ago that a tallyman had the impudence to say to him that

if he made him prove his cases he would remove his 'custom' to another court. My friend was a gentleman, and I need not say what his answer was. But however upright and honourable a man may be, it is not fair to put him in a position where his official duties and his pecuniary interests are seen to be in direct conflict. Again, I heard of a case where the registrar of a small court appealed to a solicitor who lived in the district of a big court to enter a batch of cases in the small court in order to make up his salary. There was nothing wrong in this. Still it is hardly dignified for a court of justice to be obliged to tout for business.

Another useful amendment carried by Mr. Fowler enables the registrar to hear defended cases where the amount involved does not exceed £2 and the parties consent to his jurisdiction. The £2 limit was fixed upon because in cases not exceeding £2 no solicitor's fees are allowed, and the parties therefore usually appear in person. This principle might I think be extended with advantage, and in any court where the registrar does not practise his profession, he ought to have jurisdiction to hear defended cases where the amount in dispute does not exceed £5. In bankruptcy matters he has already jurisdiction up to £200.

An attempt was made in Committee, on the recommendation of the Incorporated Law Society, to apply the useful provisions of Order XIV to the County Courts. But the amendment was rejected and, I think, rightly so. That procedure, though excellent in a court which is constantly sitting, is not adapted to courts which are held only monthly or bi-monthly as most County Courts are. If under the application of Order XIV the registrar refused leave to defend, there clearly must be an appeal. But the appeal could not be heard till the judge came round again on his circuit, and then he might just as well hear the case in the ordinary way. No time would be gained under the Order XIV procedure. What is required is the amendment of the existing procedure on default summonses. When the plaintiff issues a default summons he swears to the debt, as a plaintiff does under Order XIV. But though the debt is sworn to, the defendant can stave off the judgment until the case can be heard in ordinary course by simply sending to the registrar a notice that he intends to defend. In about eighty per cent. of the cases this notice is merely dilatory[1]. When the day of trial arrives the defendant does not appear, though he often utilises the interval to protect his goods by a friendly bill of sale or some similar device. He should be required in his notice of defence to

[1] Last year I took out the statistics of 500 default summonses. Only six cases resulted in judgment for the defendant. But in several cases the amount of the claim was reduced, and no doubt in several more the defendant really believed that he had some defence.

specify the defence he intends to rely on, and in cases over £10 he should be made to verify his defence by affidavit. In the London Courts and in the five or six large provincial Courts where the judge is constantly in attendance I think the Order XIV procedure might, with a few slight modifications, be applied with great advantage. At any rate it would be worth while to try it experimentally. I may point out that no fresh legislation is required for this. By sect. 8 of the Statute Law Revision and Civil Procedure Act, 1883 (46 & 47 Vict. c. 49) any of the provisions of the Judicature Acts, and the Rules made under them, may be applied by Order in Council to any inferior court of civil jurisdiction.

In the preceding remarks I have suggested certain amendments of the new Act which for the most part would require the intervention of the Legislature. But a great deal may be done to promote the economy and efficiency of the system without fresh legislation. Courts can be abolished, or the place of holding them changed, and districts and circuits can be re-arranged by Order in Council. Since the districts and circuits were mapped out, population has largely shifted into the great towns, and railway communication has vastly increased. There ought to be a careful inquiry into the present system and a re-arrangement of the districts by the light of the census tables and Bradshaw. Mr. Munton, the secretary of the Law Society Committee on County Courts, in a letter to *The Times* a few weeks ago, expressed an opinion that under the new Act the number of High Court actions remitted to the London County Courts would be largely increased, and that much confusion in the ordinary business of those courts would be caused thereby. If his forebodings prove correct, there is a very simple remedy. Let one of the existing London courts be relieved of a portion of its ordinary business, and be transferred to some convenient spot near Chancery Lane. A court thus situated would naturally attract to itself the greater part of the remitted cases. The judge could make special arrangements for the trial of remitted cases, so that they could be proceeded with *de die in diem*. The court would be conveniently situated both for counsel and solicitors, inasmuch as it would be close to their ordinary work. At present when a case is remitted to one of the London courts, counsel and solicitors have to give up a whole day to attend to it. To lawyers, as to all other busy men, time means money, and they are obliged to charge their clients for waste of time. A court such as I have indicated would be a great convenience to the profession, and therefore a corresponding advantage to the suitors. It would add to its utility if its registry could be used as a kind of central office for the initiation of Metropolitan County Court process. There would be some administrative diffi-

culties in carrying out this scheme, but they could I think be surmounted without legislation.

There is yet another matter which requires careful overhauling, and that is the question of court fees. A writ in the High Court costs ten shillings, however large the amount claimed, but in the County Courts the fee on a plaint for £20 or upwards is £1. This is clearly wrong. Justice in the lower tribunal should not be purveyed at a higher price than in the superior court. Either the High Court fee should be increased or the County Court fee should be lowered. If some of the reforms I have suggested above were adopted, I think the latter course could be taken. It may be right that a court of justice should be self-supporting, but the policy of making the litigants in big towns pay the piper for country courts seems very questionable. The court fees in Birmingham last year, including bankruptcy fees, amounted to more than £19,000. The total expenses of the court, I am informed, are under £9,000. In Birmingham, therefore, the court fees might be reduced 50 per cent., and yet the court would be self-supporting. The surplus fees from the big towns are employed in bolstering up miserable little country courts which ought, I think, to be improved out of existence. Turning to the Parliamentary Returns for 1887, I find that in one court in the north the total number of plaints entered was 8. The total sum for which judgments were recovered was £3, and the total amount of fees received was also £3. On the other hand, the registrar's salary was £120, and to this must be added incidental expenses and a proportionate part of the judge's salary and travelling allowance. I suppose this court has been tolerated hitherto on the principle *de minimis non curat lex*. Surely if the inhabitants of these small places wish to indulge in the luxury of litigation at home they might be allowed to pay for it themselves.

On the whole, no doubt, the County Court system is fairly efficient, as the increasing resort to these courts tends to prove; but I venture to think that the questions I have adverted to in this paper are worth consideration, and that there is yet ample room for improvements in the system both as regards economy and efficiency.

M. D. Chalmers.

HOW TO SIMPLIFY OUR TITLES.

THERE was a time, and that not many years since, when a proposal to a landowner to discuss the merits of what is called 'Free Trade in Land' would have been regarded by him in much the same light as a suggestion that he should put a price on his personal raiment. Times are changed, and now the owner of a settled estate not only welcomes the freedom of sale, which he enjoys under Lord Cairns' Act, but he asks for more; he wants cheap sale as well as free sale.

Now cheap sale is only to be ensured by simplification of title, and the question is, How are titles to be simplified? Will registration alone be effectual, or must registration be preceded by legislation prohibiting complicated dealings with the land? No class of persons in the country is so well able to answer this question as that branch of the legal profession which is commonly supposed to profit most by the complicated and costly arrangements incident to the transfer of land. If we find that representative men of that profession are doubtful as to the beneficial effect of registration, confident as to the possibility of compulsory simplification without registration, we have, to say the least of it, valuable evidence to guide us in our answer to the question above propounded.

Let us enquire how this matter has been dealt with by three Presidents of the Incorporated Law Society at their three last annual meetings. In 1886 the President, Mr. H. W. Parker, says as follows:—

'Numerous other instances might be given of the mischievous results of this adherence to the feudal rules of tenure and the artificial doctrine of estates, but the examples given above are enough to satisfy us that in these enlightened days of the nineteenth century the time has arrived when, if we are to simplify our real property law, all such artificial distinctions should be swept away and the law of realty assimilated to the law of personalty.'

The President of 1887, Mr. H. Markby, referring to Lord Halsbury's Bill of the last Session, says:—

'Looking at the failure of the two preceding Acts, surely it will be advisable to postpone the enactment of compulsory registration, at least, until it has been found by experience that the proposed legislation will work satisfactorily, and so to avoid the risk of hampering instead of facilitating the transfer of real property, and of imposing upon "possessing" landowners a scheme, which will inflict on them a heavy outlay, without, it may be, any corresponding advantage to themselves or the general public.'

The President of 1888, Mr. B. G. Lake, after a careful review of the history of conveyancing, says:—

'If it be thought necessary, without giving longer trial to the greatly simplified system of conveyancing, to further simplify dealings with land in the interest of purchasers or grantees for value, such a result may be attained without the introduction of registration, with its attendant officialism and cost, by enacting that in all future dealings with land by way of sale, mortgage, or settlement, the whole fee-simple of the land dealt with shall be absolutely vested in some one or more persons, not exceeding (say) four, who shall have an absolute power of transfer; that any subsidiary dealings with the equitable interests shall be carried out by supplemental deed; and that no purchaser or other grantee for valuable consideration shall be affected by such subsidiary dealings, whether he have or have not notice of their existence. . . . . After a comparatively short period an investigation of the earlier title would be unnecessary, since the production of the two or three last conveyances would in a few years sufficiently prove the right of transfer and satisfy the intending grantee.'

In effect it may be said that three Presidents of the Society in three successive years are doubtful as to the merits of registration, are confident that cheap transfer, security to the purchaser, and absence of injury to the vendor, may be ensured by legislative restriction on the existing powers of settlement and incumbrance.

It may be of advantage to test, and perhaps to strengthen, this position by considering somewhat in detail the lines on which the legislature should work, and the practical effect which would follow such legislation. The object of such legislation must be to dissociate from the land, as between vendor and purchaser, all subsidiary estates and all incumbrances; and the statutory provisions by which such object is to be attained must be of the following character.

All dealings with land shall be void, except that land may be conveyed, or devised in fee-simple, absolutely, to one, two, three, or four persons as joint-tenants. Land may be let to one, two, three, or four persons as joint-tenants for any term not exceeding twenty-one years at rack-rent. Nothing in the Act shall prejudice existing powers to deal by settlement or otherwise with money to arise by the sale of land. Nothing in the Act shall be held to prohibit or render void any personal contract between any persons with reference to the holding of land, or the application of the rents and profits thereof. A purchaser from the owner of the legal estate shall not be affected by notice, direct or indirect, of any settlement, dealing, or personal contract, binding the vendor. But the consideration given by the purchaser should be allowed to take the form of rent

or royalty recoverable by distress and otherwise, and certain restrictive covenants, the general character of which might be defined by statute, should be allowed to affect the owner's enjoyment and to run with the land.

The main argument against such a sweeping restriction would be that such legislation would deprive the owners of land of the power enjoyed by the owners of every other kind of property to make family settlements and to raise money by mortgage.

The best answer to such an argument is to show how, in practice, the landowner thus restricted would still be able to make indirectly reasonable settlements, and to raise money by indirect mortgages.

And first, how would he proceed to make a settlement on his marriage or by his will?

A is the settlor: by deed or will he would convey or devise the land to *B* and *C* absolutely. Then by a second deed, or by a codicil to his will, he would declare that, as between *A* on the one hand and *B* and *C* on the other hand, and as a matter of personal contract and confidence, the land shall be held by *B* and *C* for the following purposes. *B* and *C* shall forthwith, or at a future time, sell the land and receive the purchase-money, but, during the life of *A*, no sale shall be made without his consent. When a sale shall take place, *B* and *C* shall invest the purchase-money. Shall pay the income to *A* for his life. After the death of *A* shall pay the income to the widow of *A* for her life. After the widow's death shall pay £—— to each younger child for his or her portion. Shall hold the residue in trust for the eldest son of *A*. Lastly, to provide for the period before sale, and for such portion of the land as shall from time to time remain unsold, the deed must contain a proviso that *B* and *C* shall from time to time pay and apply the rents of the unsold land to such persons, and in such manner, as the income of the purchase-money would be applicable in case the land were sold and the purchase-money invested.

In the foregoing outline only the most ordinary limitations are mentioned, but such limitations may be varied and extended to meet almost every contingency within the recognized limit of 'a life or lives in being and twenty-one years afterwards.'

But secondly, how would the landowner proceed if he should have occasion to raise money on the security of his land? In fact he would do very much what he does now, only he would do it by two deeds instead of one. First, he would convey to the mortgagee absolutely, as on a sale. Secondly, there would be another deed, in which would be contained the ordinary provisions as to redemption by the mortgagor; but these provisions would rest on personal

contract between the mortgagor and mortgagee, they would not attach to the land, nor would they be matters into which a subsequent purchaser would have a right to enquire. The settlor or mortgagor, as the case may be, would be able to protect himself from the risk of fraudulent sale by the trustee or mortgagee, in breach of the personal contract governing the transaction, a risk by the way which the mortgagor runs daily under the ordinary power of sale, by a stipulation that the deeds should be deposited in the joint names of himself and of the trustee or mortgagee. He could thus secure timely warning of the intended breach of contract, and would seek his protection by injunction.

It is claimed in favour of an enforced system of indirect settlement and mortgage, such as is imperfectly indicated in the foregoing remarks, that it would be attended with these advantageous results.

The solvent landowner would still have adequate power to manipulate his estate according to his wishes. The embarrassed landowner would be relieved of the necessity to protect his title by expensive and deterrent conditions of sale. The purchasing public would go to market without the fear of seeing a good bargain ruined by a costly investigation of title.

C. E. Thornhill.

THE LIABILITY OF SHIPOWNERS AT COMMON LAW.

IN the case of *Pandorf* v. *Hamilton* Lord Justice Lopes has stated the broad principle that 'a carrier by sea is, like a common carrier, apart from express contract, absolutely responsible for the goods entrusted to him, and insures them against all contingencies excepting only the act of God and the enemies of the Queen[1].' In this statement of the common law Lord Justice Bowen and Lord Justice Fry concur[2]. The Master of the Rolls is silent with regard to this general liability of shipowners, a question which it was not necessary to decide. But his decisions in *Liver Alkali Company* v. *Johnson*[3] and *Nugent* v. *Smith*[4] show that he agrees with his three colleagues. Four Judges of the Court of Appeal have therefore expressed the same view on an interesting point of law which, strangely enough, has hitherto remained unsettled. The cause of the uncertainty is the doubt whether all shipowners incur the same liability in respect of goods carried by them as common carriers on land, or whether this extensive liability is only imposed on shipowners who are common carriers.

There are different explanations of the peculiar rule of the English law which makes common carriers insurers of the goods entrusted to them against every loss or damage, unless caused by the act of God or of the Queen's enemies. One is that of Sir William Jones, who says that a carrier for hire was originally responsible for ordinary neglect only; but that in the commercial reign of Elizabeth it was resolved upon broad principles of policy and convenience that a common carrier should answer for the value of goods of which he had been robbed[5]. The rule of the common law according to this view was first established with reference to carriers by land, and applied in the seventeenth century to carriers by water[6].

The Master of the Rolls says that the English law of bailments is founded on, though it does not exactly follow, that of Rome. This we owe to Bracton or English judges before him. Lord Esher starts, like Sir William Jones, with the general rule that bailees are only responsible for losses caused by their negligence or that of their servants. But by the Praetor's edict shipowners and innkeepers, though not land carriers, were on grounds of public policy subjected to an exceptional liability in respect of the goods entrusted to them

[1] 16 Q. B. D., at p. 633.
[2] 17 Q. B. D., at p. 683.
[3] L. R. 9 Ex., at p. 342.
[4] 1 C. P. D. 19.
[5] Jones on Bailments, 4th ed., p. 103.
[6] Per Cockburn C.J., *Nugent* v. *Smith*, 1 C. P. D., at p. 430.

(being liable for all losses not caused by *damnum fatale*[1]). This exception of the Roman law the English judges, acting at first no doubt on the general understanding of all merchants and shipowners, adopted into the common law. When they did so, 'there is no reason which can be suggested why they should not and did not adopt it in its terms, as applicable, not to a limited portion of but, to all shipmasters carrying goods for hire.' Afterwards the exception would be extended to common carriers on land because, by reason of the state of the country, their trade was so carried on as to be within the principle of the exception[2].

Mr. Justice O. W. Holmes has in a recent work given a new explanation of the liability of common carriers. He thinks it a fragmentary survival of a general law, Germanic in its origin, which made bailees absolutely responsible for loss, even when happening without their fault. Next they became similarly responsible for damage[3]. The exception of the Queen's enemies, he says, is founded on a case of the year 1455, in which the Marshal of the King's Bench Prison was sued for the escape of a prisoner[4]. With regard to the act of God, it was a general principle, not peculiar to carriers or bailees, that a duty was discharged when an act of God made its performance impossible[5].

The adoption either of Sir William Jones' or Mr. Justice Holmes' theory does not carry us far towards a solution of the point under discussion. If all bailees were originally answerable only for neglect, the question still remains whether all, or only a class of, shipowners were afterwards subjected to a wider liability. If, as Mr. Justice Holmes says, all bailees used to be absolutely responsible, and the existing rule was only established by the case of *Coggs* v. *Bernard*, did shipowners who were not common carriers remain on the old footing? If, indeed, Lord Esher's proposition could be proved to be historically true, it would go far towards clearing up all doubt. But its weak point lies in the fact that the Roman law was never part of the law of the land, although at one time its principles were freely adopted. We are, therefore, not entitled to assume without proof that the Praetor's edict was incorporated into the common law. Lord Esher cites no authority of earlier date than the seventeenth century in support of his theory.

In fact our legal records contain scarcely any information about the carriage of goods by water before that century. In Sir Robert

[1] Dig. 4. 9, *nautae caupones stabularii.* [2] *Nugent* v. *Smith*, 1 C. P. D., pp. 28–31.
[3] Holmes, Common Law, pp. 180, 199. Mr. Schuster criticises this theory in his article on 'The Liabilities of Bailees according to German Law,' in this REVIEW (vol. ii. p. 188). His conclusion is that in the English, as in the German, law all bailees were not absolutely responsible; liability depended upon the facts of reward, or guilt, or the bailee's special calling.
[4] Y. B., 33 Hen. VI, 1. pl. 3. [5] Y. B., 40 Edw. III, 5, 6. pl. 11; Holmes, pp. 201, 202.

Cotton's Records of the Tower it is stated that in consequence of merchants being slain and robbed by the King's enemies of France in the time of Edward III, certain merchants undertook safely to conduct the traders with their wool to the staple. A special charge was sanctioned by Parliament, to whom complaint was made in the 21st year of the reign that the carriers had not fulfilled their agreement[1]. The inference, if it be safe to make any, is that at this period sea carriers were not liable for the acts of the King's enemies. Molloy mentions an action brought in the same reign against the master of a ship for the embezzlement by his mariners of some money and weapons. The name of the ship suggests that it belonged to Bayonne, and both parties argued about the liability of the master under the law of Oleron, i. e. the law of the flag. Judgment was given against the master[2].

Woodlife's Case, which was tried in 1596 or 1597, deserves some mention. It was an action of account, brought against a bailee who had received goods to trade with. His plea was loss by robbery at sea. Gawdy J. thought the plea bad on the analogy of a carrier's case; Popham C.J. thought it good, and distinguished between carriers and servants or factors, saying: 'Carriers are paid for their carriage, and take upon them safely to carry and deliver the things received.' Gawdy then asserted a difference between loss by pirates and enemies, which the Chief Justice denied. They seem to have agreed that a carrier was liable for a robbery at sea which did not amount to piracy[3].

In 1613 it was decided by all the justices and barons in *Rich* v. *Kneeland* that an action on the case lay against a common bargeman for the loss of goods which he had undertaken to carry for hire, as well as against a common carrier upon the land[4].

Fifteen years later the case of *Symons* v. *Darknoll* occurred, which has been said to involve the absolute liability of shipowners[5]. The declaration sets out that every lighterman should so guide and govern his lighter than the goods carried in it should not be damaged, and that the defendant who carried the plaintiff's goods for hire so negligently managed his lighter that the plaintiff's goods were damaged by water. There was an exception that the defendant was not a common lighterman; but Chief Justice Hyde said that delivery makes the contract, and Whitelocke J. that the action was *ex malefacto non ex contracto*. And an exception that the plaintiff did not allege specially how the goods were damaged was also overruled. This case does not really prove that every lighterman's

[1] Cotton, Records in the Tower of London, p. 63.
[2] Molloy, De Jure Maritimo, Bk. ii. c. 3. s. 16.
[3] Owen, 57; Moore, 462.
[4] Cro. Jac. 330; Hobart, 17.
[5] Palmer, 523.

liability is the same as a common carrier's, although, on the face of it, it may seem to do so. There are old precedents which show that a declaration of this kind, in which an absolute duty or undertaking is set forth, must sometimes be construed with reference to a more limited duty implied by law from the relation of the parties[1]. Thus, in the Year Book, 2 Henry IV, there is a declaration that by the law and custom of the realm every one must safely and securely keep his fire, so that it shall not in any way cause damage to his neighbour; but that the defendant so negligently kept his fire that for want of the necessary care the plaintiff's goods were burned. There is a similar form of declaration in Rastall, where an absolute duty to keep one's fire so as not to injure a neighbour's property is alleged[2]. Yet if a trespasser had meddled with the fire and thereby caused the damage, it seems that the owner of the fire would not have been liable[3].

In 1673 the well-known case of *Morse* v. *Slue* was decided[4]. It is the first modern case in which the liability of the master of a ship going beyond the seas came before a court of common law. The plaintiff's goods had been put on board the ship of which the defendant was master for transportation to Cadiz. While the ship was lying in the Thames a band of robbers came on board under the pretence that they were a press-gang, and carried off the cargo. The declaration sets out that by the custom of the realm the masters of ships are bound to keep safely the goods entrusted to them to carry (Levinz adds 'dangers of the seas excepted'), and that the defendant so negligently kept them that they were lost. It was found that there was no negligence on the part of the master or his servants.

The case was argued at great length; the Civil Law, the maritime codes of the Continent, and the opinions of writers on the general maritime law were largely quoted. Ultimately the Court of King's Bench gave a judgment against the master, which Chief Justice Hale based on the following 'reasons[5]:'—

'By the Admiral Civil Law the Master is not chargeable *pro damno fatali*, as in case of pirates, storm, &c., but where there is any negligence in him he is.

[1] See *Ross* v. *Hill*, 2 C. B. 877, where the subject is fully considered.
[2] *Beaulieu* v. *Finglam*, Y. B., 2 Hen. IV. 18. pl. 6; Rastall, f. 8. pl. 2.
[3] *Turberville* v. *Stampe*, 1 Ld. Raym. 264; Roll. Abr., Action sur Case, B.
[4] There are several reports of this case; see 1 Vent. 190, 238; 2 Keb. 866; 3 Keb. 72, 112, 135; 1 Mod. 85; 2 Lev. 69; T. Raym. 220.
[5] 1 Vent. 238. The judgment is not given at length in the other reports. Keble says that the Court held that by the Civil Law and the Lex Mercatoria the master is liable so long as he is within the King's protection. Levinz states that Hale 'delivered the opinion of the whole Court, and held that this case differs not from the case of the hoyman.'

'This case is not to be measured by the rules of the Admiral Law, because the ship was infra corpus Comitatus. . . . .

'If the master would he might have made a caution for himself, which he omitting and taking the goods generally, he shall answer for what happens. . . . .

'He that would take off the master in this case from the action must assign a difference between it and the case of a hoyman, common carrier or innholder. . . . .

'If rebels break a gaol, so that the prisoners escape, the gaoler is liable; but it is otherwise of enemies; so the master is not chargeable where the ship is spoiled by pirates. And if a carrier be robbed by 100 men he is never the more excused.'

It was thus decided that for a loss in the body of a county the master's liability was the same as a common carrier's. It is not clear what his liability would be for a loss at sea; but there is a suggestion that the civil law would govern that case. Whether the Court intended their decision to apply only to masters who were common carriers is a knotty point. The ship was certainly a general ship. The plaintiff's goods consisted only of three trunks full of silk, while the ship was of 150 tons burden; although the full crew was twenty men, there were at the time of the robbery only four men on board at half-pay, 'because freight was coming in slowly[1].' This shows that the vessel was being gradually filled with a miscellaneous cargo. Moreover the plaintiff's counsel argued that the defendant was liable not only as the master of a ship, but also as a public carrier. Other arguments used by Chief Justice Cockburn in support of this view are, firstly, that the declaration is laid on the custom of the realm, and the only custom to which effect had up to that time been given was in respect of common carriers by land, and more recently in respect of common carriers by water; secondly, that Chief Justice Hale puts the case as on all fours with that of a common carrier or hoyman, and nowhere says that it is to be treated as that of a private ship. This Hale said after *Rich* v. *Kneeland* had been cited, and that was undoubtedly a case of a common barge or hoy[2].

On the other hand, the Court is general that masters of ships are bound to keep safely, &c. 'On that count,' says Lord Blackburn, 'no judgment could have been given on the ground that the ship was a general ship[3].' Perhaps, too, in saying that the case differed not from that of the common carrier or hoyman, Hale meant that the master's liability, not that his calling, was the same.

The difficulty is not cleared up by Lord Holt's reference to this

[1] 1 Vent. 190; 2 Keb. 866.
[2] *Nugent* v. *Smith*, 1 C. P. D., at p. 430.
[3] *Liver Alkali Company* v. *Johnson*, L. R. 9 Ex., at p. 341.

case in *Coggs* v. *Bernard*. He distinguishes between a carrier who exercises a public employment and a private carrier. 'The former,' he says, 'is bound to answer for the goods at all events. And this is the case of the common carrier, common hoyman, master of a ship, &c.; which case of a master of a ship was first adjudged, 26 Car. II, in the case of *Morse* v. *Slue*. The law charges this person, thus entrusted to carry goods, against all events, but acts of God, and of the enemies of the King[1].' The distinction made between common and private carriers on land, and the fact that common hoymen, not hoymen in general, are mentioned, favour the presumption that Lord Holt had in his mind the masters of general ships only. There was at this time no direct way of describing them; the term 'common carrier' seems only to have been used to designate land carriers, and the expression 'general ship' only came into use much later[2]. The judge may, unhappily, have thought his meaning sufficiently clear without using such a roundabout term as 'master of a ship who usually carries goods for hire.' But here again it may be said that there is no express limitation in the judgment to one class of ships; that every master may be aptly described as exercising a public employment; and that the reason given by Lord Holt for the strict responsibility, viz. the necessity of trusting the carrier, would be as cogent in the case of a private as of a general ship.

Boucher v. *Lawson*, however, which came before the Court of King's Bench in 1734[3], throws much light on the questions raised by *Morse* v. *Slue* and *Coggs* v. *Bernard*. In *Boson* v. *Sandford* it had already been held that an action for the loss of goods lay against the owners of a general ship as well as against the master[4]. The special verdict in *Boucher* v. *Lawson* shows that the master had taken on board some gold belonging to the plaintiff for transportation from the Tagus to London, and that it had not been delivered back to him. It was also found that there was a custom under which the master of a ship who carries gold from Portugal takes the whole freight for his own benefit. No custom of the realm was alleged in the declaration, nor was the ship said to be a general ship. Lord Hardwicke first disposed of the point that the owner did not receive the freight saying that it did not make any difference. But, he continued, upon comparing the declaration with those in *Morse* v. *Slue* and *Boson* v. *Sandford*, 'upon this declaration taken with the verdict, judgment must be for the defendant. The question is,

[1] Ld. Raym. 909, 918; S. L. C., 9th ed., vol. i. p. 215.

[2] It occurs in the report of *Barclay* v. *Cucullu y Gana* (3 Dougl. 389), a case of the year 1784. The third volume of Douglas' Reports was published only in 1831. The term is used in the earliest editions of Abbott's work (2nd ed., 1804, p. 200).

[3] Cas. temp. Hardw. 85, 194. [4] Carth. 58.

whether sufficient appears in this case to charge the defendant? Now he must be charged upon the custom of the realm, as usually carrying for hire, or else by his express undertaking. As to the custom of the realm, it is not now necessary it should be set out in the declaration, though all the old entries are so, but that being reckoned part of the common law, it is not therefore necessary to be alleged; but yet the plaintiff must prove a sufficient case within the custom; and upon all general verdicts (the Court) will take such a case to have been proved; but this being a special verdict, we can only take the case to be as it is found; and I think the case now found is not within the custom; for it is not found to be a ship usually carrying for hire, nor that it was employed in this case to carry according to the custom. In *Boson* v. *Sandford* it is laid that the ship usually carried for hire, and the jury likewise find that it usually carried for hire, and that the plaintiff delivered the goods on board, &c., so that though it is not laid or found as the custom, yet such facts are laid and found as bring it within the custom. As to its being a new ship, if that were so yet the master would be liable; but then it must appear that the ship was employed in that voyage to carry goods for hire; for anything that appears in this case, this might be a ship sent to Lisbon for a special purpose, and if so, no one can say that the master, by taking in goods of his own head, could make the owner liable. In the case of common carriers you must either set forth that in that particular instance he carried for hire, or declare upon the custom of the realm [1].'

Lord Hardwicke was clearly of opinion that the custom of the realm on which the declaration in *Morse* v. *Slue* is founded relates only to general ships. On the basis of this ruling the fact that the character of the ship in *Morse* v. *Slue* is not described is easily explained; the mere fact that the action was brought on the custom of the realm would show that the vessel was a general ship.

After *Boucher* v. *Lawson* there is the case of *Dale* v. *Hall*, which was decided in 1750 [2]. The defendant was a common keelman, but the declaration was only that he undertook to carry the goods safely from port to port, and that he carried them so negligently that they were spoiled. The cause of the damage was that rats made a leak in the ship, through which water came in. The Court held that the declaration was in effect the same as on the custom of the realm, and that the defendant was liable. The doubt indicated by Chief Justice Hale in *Morse* v. *Slue*, whether the civil law applied when a loss happened at sea, evidently did not trouble the Court. 'Everything,' said Chief Justice Lee, 'is negligence in a

[1] p. 199. [2] Wils. 281.

carrier or hoyman which the law does not excuse, and he is answerable for goods . . . in all events, except they happen to be damaged by the act of God or the King's enemies.'

In *Barclay* v. *Cuculla y Gana*[1] (1784) the facts are similar to those in *Morse* v. *Slue*. The defendant, the master of a ship, contracted to carry the plaintiff's goods from London to Spain, and gave a bill of lading in which only perils of the seas were excepted. While the ship was in the Thames the goods were stolen by armed robbers. The declaration, as in *Dale* v. *Hall*, was that the defendant undertook to carry the goods safely. His counsel argued that it contained no statement that the master was a common carrier; that according to *Boucher* v. *Lawson* he must either be charged on the custom of the realm as usually carrying for hire, or upon his express declaration. But there was no undertaking in case of robbery. The Court, however, said that the ship was a general ship, and it was impossible to distinguish the case from that of a common carrier. There appears to have been no disposition on the part of the Court, either in this case or in *Dale* v. *Hall*, to lay down a rule for all ships whether general or not. The fact that the master was a common carrier seems to have been considered material.

Many years later, in *Laveroni* v. *Drury*, Chief Baron Pollock bases the liability of masters and owners of general ships on the ground that they are common carriers for hire[2].

There are two cases of the eighteenth century, the imperfect records of which do not show the character of the ship. *Goff* v. *Clinkard* was an action against the master of a ship, whose servants had staved a puncheon of rum while letting it into the hold; and though he proved that it was let down with all possible care, the jury, under the direction of Chief Justice Lee, found for the plaintiff[3]. According to Lord Tenterden's account of *Smith* v. *Shepherd*, the plaintiff's goods were damaged on a voyage from Selby to Hull by an accident which was held not to be an act of God, but which seems to have been inevitable under the circumstances. A verdict for the plaintiff was upheld. Lord Tenterden says that there does not appear to have been any instrument of contract, so that the question depended on general principles[4].

Unless the two last-mentioned cases relate to private ships, there is no authority of earlier date than 1874 about the liability of owners of private ships. This is the more remarkable because in old bills of lading and charter-parties the obligation of the owner or master to deliver the goods entrusted to him is often not qualified

[1] 3 Dougl. 389. [2] 8 Ex., at p. 170.
[3] Note to *Dale* v. *Hall*, 1 Wils. p. 282. It is difficult to understand how, if proper care had been used, the accident could have happened.
[4] Abbott on Ship., 5th ed., p. 252.

by any exception. In West's Symboliographie there are a bill of lading dated 1598 and two forms of charter-parties in which no perils are excepted [1]. The specimens of charter-parties in Malyne's Lex Mercatoria and Jacob's work bearing the same title, which were published in 1622 and 1718 respectively, are similar [2]. But the exception of perils of the seas is already found in bills of lading and charter-parties of the seventeenth century [3], and a general usage became established to set out this exception. It was only at the end of the last century that other exceptions were added [4]. This usage may have been due to a mercantile custom of which the Courts had no opportunity to take judicial notice, or it may be that the general use of this bill of lading led to the belief that by law shipowners were not liable for losses caused by perils of the seas. There is certainly evidence of the prevalence of this belief among lawyers. Molloy, in commenting on *Morse* v. *Slue*, says that it was decided that the master must 'at his peril see that all things be forthcoming that are delivered to him, let what accident soever happen (the act of God or an enemy, perils and dangers of the seas only excepted) [5].' He also says elsewhere that for a loss by pirates at sea the master is excused [6], clearly, from other passages, because a robbery by pirates comes within the exception of dangers or perils of the seas [7]. Jacob also exempts the master from responsibility for dangers of the sea, and follows Molloy almost literally [8].

There is a dictum of Lord Holt's in *Lane* v. *Cotton*, that if in *Morse* v. *Slue* the ship had been robbed at sea, the master would not have been answerable [9]. Perhaps he thought at this time that masters were not liable for perils of the seas. But this dictum does not agree with his later judgment in *Coggs* v. *Bernard*, unless he thought that pirates were the King's enemies.

Finally, in the preamble of a statute of 1786 (26 Geo. III, c. 86) there is a statement of the law relating to this question. The Act was passed to limit the liability of shipowners for certain losses. The statement is that all masters and owners of ships are subject to answer for any goods put on board any vessel, 'notwithstanding such goods . . be lost by robbery, fire or other accident (other than by the King's enemies, the peril of the seas or the

[1] West (ed. 1647), ss. 655, 656, 659. [2] Malyne, 2nd ed., p. 99; Jacob, pp. 107, 109.
[3] Marsden's Admiralty Cases, p. 240; *Barton* v. *Wolliford*, Comb. 56; *Pickering* v. *Barclay*, 2 Roll. Abr. 248, Style, 132.
[4] Abbott on Ship., 5th ed., p. 215.
[5] Molloy, De Jure Maritimo, Bk. ii. c. ii. s. 2. [6] Ibid., Bk. ii. c. ii. s. 8.
[7] Ibid., Bk. ii. c. iv. s. 7. In an earlier part of his work he says that pirates are not enemies (Bk. i. c. iv. ss. 3, 4). It had already been decided twice that a robbery at sea by pirates falls within the exception 'dangers of the seas' in a bill of lading or charter-party (Comb. 56; 2 Roll. Abr. 248, Style, 132).
[8] Lex Mercatoria, p. 59. [9] 12 Mod., at p. 484.

act of God),' except in case of a robbery provided for by 7 Geo. II, c. 15.

As the modern practice of shipowners is almost invariably to embody their contracts in bills of lading or charter-parties, in which the risks for which the carrier is not liable are specified, the point under discussion did not come before the Courts for a considerable time. In 1872 it did, however, arise in a case which has already been mentioned[1]. A flat or barge, while on a voyage up the Mersey with a cargo of salt, struck on a stony bank in foggy weather and was lost, without any negligence on the part of the crew. The owner of the cargo brought an action for not safely carrying it. There was no written contract. The question whether the defendant was a common carrier was stoutly fought. He was a flatowner or lighterman, who let out his vessels to any customer who applied; but there was no description of his trade over the door of his premises. His flats did not ply between any fixed points, nor did he ever let a flat to more than one person for the same voyage; and a separate bargain was made on each occasion. The plaintiff did not select a particular flat, nor as a rule did other customers select one. The Court of Exchequer held on these facts that the defendant was a common carrier, and therefore liable. The case was taken to the Exchequer Chamber, where Mr. Justice Blackburn delivered a judgment in favour of the plaintiff, in which three of his fellow Judges concurred; Mr. Justice Brett came to a similar conclusion on other grounds. Mr. Justice Blackburn held that the defendant had the liability of a common carrier, but did not think it necessary to decide that he was one, so as to be liable to an action for not taking goods tendered to him. The authorities on which he mainly relied are *Morse* v. *Slue*, *Lyon* v. *Mells*[2], and *Ingate* v. *Christie*[3]. The ultimate decision in *Morse* v. *Slue* has always, he says, 'been understood to apply to all ships engaged in commerce and sailing from England[4]. . . . And certainly it is difficult to see any reason why the liability of a shipowner who engages to carry the whole lading of his ship for one person should be less than the liability of one who carries the lading in different parcels for different people.' In *Lyon* v. *Mells*, he continued, the employment of the defendant was less clearly a public employment; but, although the point was not decided[5], 'the opinion of Lord Ellenborough and (so far as we can judge from the report) of every one concerned in the case

[1] *Liver Alkali Company* v. *Johnson*, L. R. 7 Ex. 267, in Ex. Ch., L. R. 9 Ex. 338.

[2] 5 East, 428.

[3] 3 C. & K. 61. In this case Alderson B. held that the defendant was a common carrier, because he offered to carry for any one.

[4] *Boucher* v. *Lawson* was not cited.

[5] The point decided in *Lyon* v. *Mells* was that the terms of a certain notice did not free the defendant from liability for furnishing an unseaworthy lighter.

was that it was too clear for argument that, but for the notice, the lighterman, acting as the defendant did in that case, would have been liable to the same extent as a common carrier.' At the risk of being deemed presumptuous, I venture to think that the learned Judge has introduced an element of confusion by refusing to decide whether the defendant was a common carrier or not[1]. If he was not, he must have incurred the liability of a common carrier, because either shipowners in general, or at least lightermen, have this liability. As it is, we do not know on what principle the majority of the Judges decided the case.

Mr. Justice Brett's decision is free from ambiguity. He held that the defendant was not a common carrier, but that 'every shipowner who carries goods for hire in his ship . . . undertakes to carry them at his own absolute risk, the act of God or of the Queen's enemies alone excepted, unless by agreement between himself and a particular freighter, on a particular voyage, or on particular voyages, he limits his liability by further exceptions.' This is, 'by reason of a recognised custom, wholly independent of the similar custom with regard to common carriers.'

In *Nugent* v. *Smith* Mr. Justice Brett, in delivering the judgment of the Divisional Court, again affirmed the rule laid down by him in *Liver Alkali Company* v. *Johnson*[2]. It was not necessary in *Nugent* v. *Smith* to decide the liability of shipowners in general, as the defendant was undoubtedly a common carrier. But as the point had been argued, and the Court considered it one of great importance, they thought it right to give judgment upon it. The ground of their decision has already been mentioned at the beginning of this article. In the Court of Appeal Chief Justice Cockburn criticised the decision of the Court below on this point in strong terms[3]. He said that there was no common law authority for the proposition that by the law of England every carrier by sea is subject to the same liability as the common carrier. Nor did the Roman law afford any support to this doctrine; for the Roman law imposed no liability on carriers on land, beyond that of other bailees; and the law of England relating to the liability of common carriers was first established with reference to carriers on land. Besides, the Roman law made no distinction between inevitable accident arising from the 'act of God' and inevitable accident arising from other causes. The liability of carriers by sea was different in the Roman law, and is different in all countries where

[1] As common carriers are liable to an action for refusing to carry goods, the learned Judge, in saying that it was not necessary to decide whether this action would lie, virtually left it undecided whether the defendant was a common carrier.

[2] 1 C. P. D. 19, 26. [3] Ibid. 426.

the Roman law has been adopted. After reviewing certain cases which have already been noticed, beginning with *Rich* v. *Kneeland*, the Chief Justice concluded: 'While it does not lie within our province to criticise the law we have to administer or to question its policy, I cannot but think that we are not called upon to extend a principle of extreme rigour, peculiar to our own law, and the absence of which in the law of other nations has not been found by experience to lead to the evils for the prevention of which the rule of our law was supposed to be necessary, further than it has hitherto been applied.'

Chief Justice Cockburn does not say what, in his opinion, the liability of a shipowner is. The only other rule which can be suggested is that on general principles a shipowner, like a private carrier on land, is only responsible for the negligence of himself or his servants. That seems to be the opinion of Mr. Justice Story, who says in his treatise on bailments that if the owner of a ship employs it on his own account generally, or lets the tonnage with a small exception to a single person, and then for the accommodation of a particular individual takes goods on board for freight (not receiving them for persons in general), he will not be deemed a common but a mere private carrier [1]. And he had previously said that a private carrier is not responsible for any losses not occasioned by ordinary negligence [2].

If it should ever need to be argued that the basis of the shipowner's contract is responsibility for negligence alone, Mr. Justice Willes' dictum in *Grill* v. *Iron Screw Colliery Company* [3], which was quoted by Lord Herschell in *The Xantho* [4], Chief Baron Pollock's direction in *Laurie* v. *Douglas* [5], and some passages in *Notara* v. *Henderson* [6], might possibly be cited in support of the argument. Mr. Justice Willes says that, where there is a bill of lading, 'the contract is to carry with reasonable care, unless prevented by the excepted perils.' But he adds that if the goods are not carried with reasonable care, and are consequently lost by an excepted peril, the shipowner is not excused. His meaning seems to be [7] that if a loss proximately due to an excepted peril has been contributed to by the shipowner's want of care, he is still liable. In *Laurie* v. *Douglas* there was a contest whether, even if a loss was *prima facie* a danger of navigation, it had not been really caused by negligence [8]. In *Notara* v. *Henderson* the cargo had been wetted

[1] s. 501. [2] s. 457. See also Chitty's Commercial Law, vol. iii. pp. 370, 384, 386.
[3] L. R. 1 C. P., at p. 612. [4] 12 App. Cas., at p. 510.
[5] 15 M. & W. 746. [6] L. R. 7 Q. B., at p. 236.
[7] [It seems to me that the meaning of Willes J. is clear enough, and is exactly the same which Lord Macnaghten expressed rather more fully in the passage cited below.—Ed.]
[8] The Chief Baron left it to the jury to say, firstly whether the injury arose from a peril of the seas in the course of navigation, secondly whether the defendants had

by sea-water; but it was contended that, although the shipowner was not liable for this casualty, the damage ensued because the master neglected to dry the cargo. The decision was that a shipowner cannot avail himself of an exception in a bill of lading, to escape liability for his want of care.

I cannot agree with the remarks of T. E. S. in this REVIEW about the principle of the recent decisions of the House of Lords. He says: 'The principle appears to be that the contract of the shipowner as contained in the charter-parties or bills of lading is to carry the goods with reasonable care and diligence, unless prevented by one of the excepted perils[1].' As he justly observes, if the contract is only to carry with due care, the exceptions are meaningless. But the principle of the contract is very differently stated by Lord Macnaghten. The bill of lading, he says, 'states the engagement on the part of the shipowner to deliver the goods entrusted to his care. At the same time it specifies, by way of exception, certain cases in which failure to deliver these goods may be excused. But the shipowner's obligations are not limited and exhausted by what appears on the face of the instrument. Underlying the contract, implied and involved in it, there is a warranty by the shipowner that his vessel is seaworthy, and there is also an engagement on his part to use due care and skill in navigating the vessel and carrying the goods. Having regard to the duties thus cast upon the shipowner, it seems to follow as a necessary consequence, that even in cases within the very terms of the exception in the bill of lading, the shipowner is not protected if any default or negligence on his part has caused or contributed to the loss[2].'

It has never been decided that a shipowner is, in the absence of a special contract, only liable for negligence. The fact that he must answer for a loss caused by the unseaworthiness of his vessel at the commencement of the voyage, although he may have taken every reasonable care to make it seaworthy, indicates that a stricter view has been taken of his responsibility[3].

My object has been to trace the development of the law on the subject of this article, not to propound any theory. I only submit that the following conclusions can be drawn from the series of cases

taken proper care of the goods, directing them that they were only bound to take the same care as a person would of his own goods. The cause of the damage was that the ship canted over in dock, and water got in through the ports. It was contended that the ship was not properly moored. This must have been the alleged want of care. There is no report of the judgment in which the Chief Baron's direction was upheld.

[1] LAW QUARTERLY REVIEW, vol. iii. p. 474.

[2] *The Xantho*, 12 App. Cas., at p. 515; see also Lord Watson's remarks in *Hamilton* v. *Pandorf*, 12 App. Cas., at p. 526.

[3] In *Redhead* v. *Midland Railway Co.* (L. R. 4 Q. B., at p. 383), in the Exchequer Chamber, the Court doubted whether a common carrier of goods on land undertook responsibility for hidden defects.

which have been discussed. *Morse* v. *Slue* and *Boson* v. *Sandford* together establish that the liability of the owner of a general ship is the same as that of a common carrier on land. In *Boucher* v. *Lawson* the point for decision was whether the master had authority to bind his owner; but in deciding that point the Court held that the custom of the realm set out in the declaration in *Morse* v. *Slue* did not apply to a private ship. Had they thought otherwise they would, on the authority of *Boson* v. *Sandford*, have held the owner responsible. In the eighteenth century the opinion seems to have been entertained that shipowners were not liable for losses caused by perils of the seas; but there is no case in which it became necessary to decide this point. The only decision on the liability of the owner of a private ship is Lord Esher's in the Exchequer Chamber, in *Liver Alkali Company* v. *Johnson*; and although the other Judges decided the case on other grounds, they are not in conflict with him on this point. Lastly, as we have seen, his decision has been adversely criticised by the late Lord Chief Justice, and recently approved in dicta of Lords Justices Bowen, Fry, and Lopes.

E. L. DE HART.

FEOFFMENT AND LIVERY OF INCORPOREAL HEREDITAMENTS.

'Inceptis gravibus plerumque et magna professis
Purpureus, late qui splendeat, unus et alter
Assuitur pannus.'

BRACTON, or the author of the treatise which bears his name, most industriously sewed patches of imperial purple to the imperfectly woven texture of English law. He picked up some pieces of the mantle of Justinian, and made a coat of many colours with the aid of the plea-rolls of Henry III of England. Let it not be thought that this is said in any spirit of disrespect towards his genius. He succeeded in the almost impossible task of making old bottles hold new wine. But he did not succeed all at once, and if some of his teachings or doctrines very nearly in accordance with them became settled law generations afterwards, they were not uniformly accepted by his contemporaries or immediate successors.

Blackstone and Bracton are practically in agreement on many points. Blackstone would have regarded the title of the present article as a meaningless collocation of words; Bracton would have understood its meaning, but would, with the calm superiority of an ecclesiastic, have pardoned it only *propter simplicitatem laicorum*. Chief Justice Herle, probably as great a lawyer as either, would hardly have thought that it was in need of an excuse, though he might have desired a reformation in the law.

'Res incorporalis non patitur traditionem,' says Bracton [1], from a Roman point of view; and every one knows that in recent times incorporeal hereditaments in gross have been said to lie in grant and not in livery and to be incapable of passing by feoffment. It does therefore seem, at first sight, impossible that there could have been any feoffment or livery of incorporeal hereditaments in England after the time of Bracton. But Bracton was in some respects in advance of his age, and it was long before his theories became ingrained in English law.

This article has grown out of some researches which were suggested by the mention of feoffments of rent in certain Year-books. The idea which naturally presented itself at first was that the reading must be wrong and ought to be corrected. But the more the readings were attacked the more stubbornly they held their

[1] Bract. 39 b.

own; and in the end they assumed the aggressive and carried the war into the whole field of incorporeal hereditaments. Of course there either could or could not be a feoffment of rent; and, if there could, why not a feoffment of common or of an advowson?

In the case No. 1 in Trinity Term, 14 Edward III[1], there presents itself a feoffment of rent, but not a feoffment of rent alone. The defendant in assise pleaded that he had entered on certain land and certain rent by virtue of a feoffment, and the Assise found that there had been a feoffment of land and of rent. There are two reports, but, though they differ in some minor details, they agree as to the feoffment. If however this instance stood alone, the words might perhaps be explained away. It might be supposed that the alienor enfeoffed the alienee of the land and granted to him the rent, and that the words in which the distinction was drawn had dropped out through accident or been omitted for the sake of brevity.

This explanation is nevertheless unnecessary, and would probably be incorrect, for the words are perfectly consistent with the words which occur in other cases relating to rent alone and which are not susceptible of more than one interpretation. Thus in an action of Debt on obligation[2] (*Drayton* v. *Holewell*) the defendant pleaded a defeasance according to the terms of which the obligation was to be void if he enfeoffed the plaintiff of 12*s.* of rent, and pleaded that as no particular day was mentioned on which he was to enfeoff, he might still fulfil the condition and need not further answer. The plaintiff prayed judgment because the defendant had neither denied the deed nor said that he had enfeoffed. The defendant then said that ever since the execution of the deed he had been and still was ready to enfeoff. The plaintiff again prayed judgment because it was expressed in the defeasance that the defendant was to enfeoff, and was admitted by the defendant that he had not enfeoffed. In the end issue was joined as to whether the defendant had been ready to enfeoff.

There are two reports of this case, and they are in perfect agreement so far as the use of the word 'enfeoff' is concerned. But this is not all. The record of the case[3] has been found and compared with the reports, and is in complete accordance with them. It there appears, too, precisely as in the reports that issue was joined as to whether the defendant was or was not ready to enfeoff (*'paratus feoffare'*) the plaintiff of the rent.

The expressions used in *Drayton* v. *Holewell*, and the iteration of

[1] Y. B. (Rolls Series), 14 E. 3, p. 165 (*Totenhale* v. *Wiriot*).
[2] Y. B. (Rolls Series), Easter, 14 E. 3, No. 47, p. 111.
[3] *Placita de Banco*, Easter, 14 E. 3, Ro. 243.

the word 'enfeoff,' are perhaps sufficient of themselves to show that there might be a feoffment of rent in the reign of Edward III. It may, however, be urged that this is not a case in which the feoffment was actually effected, and that, in order to prove the point beyond all doubt, there must be found some instance in which such a feoffment was admitted. Be it so. The conditions are fulfilled in *Dyen and another* v. *Bousser and another*[1]. This was an action of Replevin, and in a very lengthy avowry it was alleged (*inter alia*) that the grantee for life of a certain rent enfeoffed thereof (*feoffavit inde*[2]) a certain person in fee. Thereupon the reversioner 'entra la rente' according to the words of the reports, or 'seisivit in manum suam redditum illum' according to the words of the record. He did, in fact, precisely what he would have done, had tenant for life aliened land in fee[3]—he entered upon the tenement aliened. The plaintiffs did not traverse any of these allegations, but said that the supposed grantee for life was in fact grantee in fee, and on that question issue was joined. The jury found for the avowants and judgment was given for them.

It was here admitted on all hands that a reversioner could enter upon rent after a tortious feoffment by tenant for life. Neither the grantee for life nor the feoffee was made a party to the action of Replevin. The plaintiffs on whose beasts the distress had been levied were the tenants of the lands, etc. out of which the rent issued, and, but for the tortious feoffment and subsequent entry, the rent would have been due to the grantee for life. From the words of the record and of the reports it seems that the particular distress which was the ground of the action was something different from the reversioner's 'entry,' or act of seizure, whatever that may have been. The manner in which entry upon rent could be effected certainly does not disclose itself very readily, though the fact that it could be accomplished appears in other cases.

Before, however, taking leave of *Dyen and another* v. *Bousser and another*, there is yet one point which it may be useful to note. The tenant for life of the rent held that rent itself by the service of another rent, that is to say he held a rent of twenty-four shillings by a rent of one penny[4]. No question was raised as to whether rent could be so held. Like the possibility of the feoffment, it

[1] Y. B. (Rolls Series), Easter, 14 E. 3, No. 30, p. 77. And see the Introduction, p. xlviii.

[2] These words are from the record *Placita de Banco*, Easter, 14 Ed. 3, Ro. 101 d. The reports are very short, and the word used in them is 'aliena.'

[3] Litt. sect. 415.

[4] The grantor 'concessit praedictas viginti et quatuor solidatas redditus cuidam Ricardo Fitz Andreu tenendas ad totam vitam ipsius Ricardi de praedicto Johanne [the grantor] et heredibus suis per servitia unius denarii per annum.'

seems to have been admitted by everyone. In the reign of Henry VI[1] it was argued that rent could not (as alleged by a certain plaintiff) be held by knight-service. Babington, Ch. J. C. P., said that rent might be so held of the king, and he might grant the seignory to another, of whom the rent would then be held as it had been previously held of him, and this was a proof that the rent might be held of the plaintiff as alleged. Coke also recognised the fact that in case of mesnalty, where there had been subinfeudation before the statute of *Quia emptores*, one rent or service might issue out of another[2]. All these instances, however, are contrary to the general principle that a rent must issue out of hereditaments corporeal, while, on the other hand, they may help to render the idea of feoffment of rent more familiar.

Though Bracton, Britton, and Fleta certainly recognised a distinction between things corporeal and things incorporeal, and to a certain extent between the modes of conveying them, it may be of importance to notice that these writers had not arrived at a clear definition of feoffment and livery on the one hand and of grant on the other. Even Bracton himself spoke of a feoffee of rent: 'Item potest quis esse tenens meus, reddendo mihi redditum, et possum redditum illum dare alicui et attornare tenentem meum ad reddendum redditum illum *meo feoffato* per manum suam[3].' When a 'charter' was made, the operative word was give (*Do, Dedi*). In Britton[4] there is, in French, a form of a gift of rent charge, the word 'grant' not being used: 'J. de B. to all who shall see or hear this letter, Greeting. Know that I have given[5] to P. . . . £100 of annual rent in N. and S., so that out of the manors aforesaid he may take the aforesaid rent from year to year . . . . and thereof, in the name of seisin, I have delivered to him 100*s.* beforehand, and . . . . I bind the aforesaid manors to the distress,' etc. It is clear from this form that, whatever expressions may be found elsewhere to indicate a distinction between corporeal and incorporeal things, the men of Britton's time had difficulty in shaking themselves free from the idea that some sort of livery was necessary upon every alienation of a freehold.

Some explanation of the manner in which seisin of rent could be given is to be found in a case of the reign of Edward III[6]. A defendant in Trespass justified the taking of beasts on the following ground. One Alice brought a writ of Dower in respect of a certain rent against one T., and recovered, and sued execution by writ of *Habere facias seisinam*. The defendant in Trespass was her bailiff

[1] Y. B. Mich. 10 H. 6, No. 40, p. 12.
[2] Co. Litt. 142.
[3] Bract. 169.
[4] Brit. lib. ii. c. 10, § 3.
[5] 'done,' and 'done' alone.
[6] Y. B. Easter, 40 E. 3, No. 19, pp. 21–22.

and the Sheriff put him in seisin, and delivered to him the beasts, for rent in arrear, and for the purpose of putting him in seisin as Alice's bailiff; and he detained them, until satisfaction had been made for the arrears. Other questions were raised, but it was not disputed that seisin of rent could be given by beasts, or by a blade of grass or clod of earth.

There is no great difficulty in finding other instances in which the expression enter upon rent ('entrer en le rent') is used. It occurs several times in a report of a case in the forty-third year[1] of the same reign, as well as the phrase entry upon rent ('entry de rent'). The action, indeed, was brought to recover rent by Writ of Entry, and an heir is described as entering upon rent just as he would enter upon land. In the forty-ninth year[2] Counsel says, 'Suppose a man attorn and pay to his lord an ox or a cow [in the name of rent], that is adjudged seisin of the rent in the lord,' and this was expressly allowed by the Court.

Even when rent service was conveyed by deed of grant, it was no more than a rent seek, unless there was also a ceremony which was to all intents and purposes livery of seisin. Without this the grantee had only a seisin in law, and not a seisin in deed. He was not seised of the freehold, so that an assise of Novel Disseisin would lie. The attornment of the tenant would not give the grantee such seisin[3], even though the tenant gave the grantee a coin in token of his attornment[4]. But when the tenant gave the grantee a coin, or (according to the commentary of Coke) a sheep, ox, ring, or anything else of value in the name of seisin of rent, the grantee was then seised of the freehold, so that an assise would lie. It is to be observed also that money or anything else delivered in token of seisin of rent before any rent became due was not deducted from any subsequent payment of rent. If it was regarded as a part of the rent, it was so regarded only for the one purpose of effectual livery in deed, which could not be otherwise accomplished[5].

Similarly also if one granted a yearly rent issuing out of his land and gave the grantee a coin (or anything else of value) in token of seisin of the rent, the grantee became seised in deed, and could have an assise of Novel Disseisin if payment of the rent were refused when due[6]. Otherwise he had no such remedy.

If it be asked whether there could be feoffment of common, the

[1] Y. B. Hil. 43 E. 3, No. 28, pp. 9–10.
[2] Y. B. Easter, 49 E. 3, No. 9, p. 15 B.
[3] Litt. sect. 235.
[4] Litt. sect. 235.
[5] Litt. sect. 565.
[6] Co. Litt. 314.

answer is given in the Statute of Westminster the Second [1] and in Britton. The words of the Act are, 'Si quis clamat communiam pasturae per speciale *feoffamentum* vel concessionem ad certum numerum averiorum, vel alio modo quam de jure communi habere deberet, cum conventio legi deroget, habeat suum recuperare quale habere deberet per formam concessionis sibi factae.' And Britton says [2], 'In case of feoffment (en le cas de feffement), if the purchaser be ejected immediately after the assignment of the donor, even though the purchaser has not put his beasts into the pasture, yet it will not follow on that account that he shall not recover by this assise.'

Wherever, indeed, an assise of Novel Disseisin lay, there it was essential that the subject of the action should be of such a nature, in fact or in theory, that a person could have seisin of it, could be disseised of it, and could have the seisin of it restored to him. It must therefore have been susceptible of livery, and, if of livery, of feoffment. There is a passage in Britton [3] which is of great importance in relation to this matter, and with regard to the translation of which it may be permissible to differ from Mr. Nichols, accurate as he usually is. The French words are, 'feffement n'est de rien for qe de soil, *et* dount hom purra recoverer seysine par ceste assise, si hom soit a tort engetté.' The translation given by Mr. Nichols is, 'feoffment is only of soil, whereof a person, being wrongfully ejected, may recover seisin by this assise.' But the word *et* is here treated as meaningless. The meaning seems to be, 'there cannot be a feoffment of anything except of soil, or of that whereof seisin may be recovered by this assise.' This is more consistent with the whole doctrine of assise, as well as with the other words of Britton quoted above.

The passage in Bracton [4] which runs parallel with that of Britton relating to feoffment of common does not contain the word feoffment, for which the more general word gift (*donationis*) is substituted. It may, however, serve to show how seisin was given in this case. If the feoffee or donee had, either in his own person or by substitute, view of the tenement in which the common was granted, that sufficed for livery (*pro traditione*), and he was immediately in seisin, or in quasi-seisin, by virtue of the intention of the donor to give, and his own intention to possess, and by virtue of the view, even though he did not immediately put his cattle in. The view, however, as appears in Britton, had to be given in the presence of neighbours. This proceeding would of course have had the effect of giving a seisin in law, without entry, in the case of anything corporeal.

[1] c. 46. [2] Lib. ii. c. 26. § 2. [3] Lib. ii. c. 3. § 1. [4] Bract. 225.

Although a search of some length in likely places has not brought to light any particular instance of feoffment of common, there is no difficulty in finding instances in which livery of common is mentioned. This livery might follow either upon a grant by specialty or upon a recovery by judgment, but it does not seem to have been absolutely necessary in either of those two cases.

There is a report which has been printed in various forms and under various dates, but which contains at the end some noteworthy words apparently of William Thorpe, Ch. J. 'If,' he says, 'a man grant to me common of pasture, and I have not any beasts to put into the common in order to put myself in seisin, and for that reason I take other beasts, etc., and he deliver to me his seisin of the common, and is present when I put the beasts in, and he assent to this user and to this putting in of such beasts, etc., or command me so to do, I say that in this case it is a sufficiently good seisin[1].' Thorpe also said: 'If one recover rent, or common, or the like in the King's Court, whereupon the Sheriff comes to the place, and delivers seisin of the thing recovered by parol, in virtue of that seisin delivered by parol he shall have an assise, and writ of Redisseisin if afterwards he be disturbed from taking that profit, because the law adjudges him to be in seisin immediately by virtue of the judgment of recovery without livery of seisin [in deed] or taking profit.'

On the other hand, it was held as early as the reign of Edward II, that one who had common of pasture granted to him by specialty might use it without livery[2]. The same doctrine was also very clearly laid down in the year 36 Edward III[3]. These instances of grant by specialty, however, do not affect the practice in cases of feoffment, which might be without any deed at all. Moreover, the grant of common is different from the grant of rent, inasmuch as the common lies in prender, and rent in render, and for that reason the doctrine of seisin as affecting one was different from the doctrine of seisin as affecting the other, and livery in law may have been sufficient in one case, though livery in deed was necessary in the other.

Perhaps, however, one of the most remarkable of the early doctrines with regard to incorporeal hereditaments is to be found in a report of the forty-third year of Edward III[4]. Counsel, as it there appears, stated that neither an advowson nor rent-service could be

[1] 22 Li. Ass. 84. See also Y. B. Trin. 45 E. 3, No. 38, pp. 25–26, and Fitz. *Assise*, 61 and 228.
[2] Fitz. *Assise*, 452.
[3] Fitz. *Comen*, 20; 36 Li. Ass. 3.
[4] Y. B. Hil. 43 E. 3, 1 (No. 3).

granted without deed. Upon this Thorpe, Ch.J. C.P., remarked: 'I deny unto you that which you have said—that an advowson cannot be granted without deed, for I say that it is sufficiently good to go to the door of the church and to say "I give you this advowson," and deliver seisin of the door, and the gift is sufficiently good without deed.' And all the Justices affirmed this.

At the same time a broad distinction between an incorporeal hereditament, such as an advowson, and a corporeal hereditament, was, for some purposes, and (perhaps it is necessary to add) by some persons, almost as clearly drawn in the fourteenth century as at any subsequent period. Thus it was laid down by Willoughby Ch. J.[1] (in relation, however, to conveyance by fine), that an advowson, being an incorporeal hereditament (*chose nient maniable*), might pass by words, that is to say without livery. This is not inconsistent with the doctrine that it might also pass by livery. It could, in fact, according to these decisions pass either by grant or by livery; and it was distinguished from the corporeal hereditament in possession not by lying in grant alone while the corporeal hereditament lay in livery alone, but by lying either in grant or in livery, while the corporeal hereditament in possession lay in livery alone.

Some of the passages of Co. Litt. which have a relation to this subject are, perhaps, worth comparison with the earlier cases. Though, in the main, they are in accordance with the later doctrine, they show here and there a little hesitation, and a desire to establish more firmly an opinion not yet fully accepted. 'If an advowson be holden by knight's service, and the tenant dieth, his heir being within age, the lord cannot grant the wardship of the advowson without deed, because it is derived out of an inheritance that lieth in grant, and passeth not by livery; for *jus praesentandi est incorporale*, and so (*albeit there be diversity of opinion in our books*) is the law taken at this day[2].' This is a plain admission that it was at some previous period not settled law that an incorporeal hereditament lay in grant and not in livery.

Elsewhere there appears a desire to strain the words of Littleton, who speaks in section 628 'of an advowson, or of such things which pass by way of grant without livery of seisin.' The Commentary is:—'Here it appeareth (as hath been said) that an advowson doth not lie in livery but in grant[3].' This introduces a negative for which Littleton is not in any way responsible. He says, as might have been said at a still earlier period, that an advowson passes by grant without livery, but he does not say that an advowson cannot

[1] Y. B. (Rolls Series), Easter, 14 E. 3, No. 10 (p. 14).
[2] Co. Litt. 85 a.
[3] Co. Litt. 335 b.

pass by livery. So also in section 617 Littleton speaks of granting an advowson by deed, and although he says nothing whatever about livery, it is made to appear in the Commentary that an advowson is mentioned as a thing that lieth in grant, and passeth not by livery of seisin[1].

An advowson, however, stood, perhaps, on a somewhat different footing from other incorporeal hereditaments because the mode of conveying it had, almost within living memory in the time of Edward III, undergone a very remarkable change. The famous Herle, Ch. J. C. P., in the seventh year of the reign thus expressed himself[2]:—'Not long ago it was not known what an advowson was, but, when the intention was to give an advowson to another, it would be expressed in the charter that the alienor gave the church.' This opinion, it is true, is noticed in Co. Litt.[3], with some depreciatory remarks based upon the occurrence of the word 'advocatus' in the writ of Darrein Presentment, and upon the occurrence of the words 'advocatus' and 'advocatio' in the part of Bracton which relates to that writ and in the parallel passages in Fleta and Britton. The use, however, of these words is not inconsistent with Herle's statement, and the best possible proof that it is not is to be found in another part of Bracton's treatise which may have served as the foundation of all that Herle said.

Bracton[4] here draws a distinction between a church as that which is corporeal, being made of wood and stone, on the one hand, and a right of presentation, on the other hand, which is incorporeal. 'It is one thing,' he says, 'to give a church and another thing to give (*dare*) an advowson. Laymen, however, according to common usage, on account of their want of art (*simplicitatem*) give churches, which means no more than presenting to them. A layman therefore presents to a vacant church as being built of wood and stones, so that the presentee may govern the church; and the bishop also gives it, that is to say admits the presentee to govern, and institutes him. If, however, the lord of the *fundus* give the advowson, that is to say the right of presenting, that will be a different thing.' Bracton then proceeds to lay down the doctrine that if any one give a church 'viris religiosis' to their own use the right of presentation remains with the patron, but if, on the other hand, he give them 'jus advocationis alicujus ecclesiae' they may, 'de gratia et dispensatione,' retain for themselves the right of presentation.

[1] Co. Litt. 332 a.
[2] Y. B. Hil. 7 E. 3, No. 8, p. 5.
[3] Co. Litt. 17 b. The translation there given is misleading because the words 'grant' and 'granted' are used instead of 'give' and 'gave.' The French words of the original are 'doner' and 'dona.'
[4] Bract. 53.

These distinctions are nevertheless entirely undone by the following sentences. Bracton appears to have been stating the law as he wished it to be rather than as it was, for he continues thus:—'Nevertheless a gift of this kind (of a church) has by custom and usage a different interpretation and a different meaning. Thus if one say "Do talem ecclesiam talibus viris religiosis," where mention ought to be made of the advowson, such a gift is sufficient to transfer the right of patronage (*jus advocationis*); and, on account of the layman's want of art, it is interpreted to mean that the layman by these words gives all the right that he has in that church, that is to say the right of patronage (*jus advocationis*) together with that church.'

Bracton then proceeds to cite a case in the following terms:—'secundum quod inveniri poterit de Termino Sanctae Trinitatis anno regni Regis Henrici quarto, in comitatu Lincolniae de ecclesia de Wichine data Priori de Markeby,' but without giving any further particulars. It does not appear to have been known to Fitzherbert, and it can be identified only in 'Bracton's Note Book,' for the publication of which we owe so much to Mr. Maitland, or in the actual record, or in both. There cannot be a doubt that it is that which appears upon a roll in the Public Record Office now known there as 'Coram Rege Roll, Trinity, 4 Henry III,' but ticketed before its removal to the Public Record Office as 'Placita de Banco' of the same Term. The roll, as now made up, contains in fact Common Pleas, that is to say pleas of Land of various kinds, pleas of Debt and Detinue, and the like, and with them a few appeals of Robbery, etc.

The case, as it appears in this so-called Coram Rege Roll[1], was as follows:—The Prior of Markeby brought an action of *Quare impedit* against Robert de Turs and Beatrice his wife, Roger de Wilgeby and Mary his wife, Alice sister of Mary and Beatrice (and two others who disclaimed), in respect of the church of Wiclive. The Prior counted that Alan de Mumby, son of the uncle of Beatrice, Mary, and Alice whose heirs they were, gave (*dedit*) to him and his House that church (*ecclesiam illam*). He produced a charter purporting that Alan gave (*dedit*) to God and the Church of St. Peter of Markeby the church (*ecclesiam*) of Wiclive with the chapels appurtenant thereto: '*sicut aliquis laicus aliquam ecclesiam liberius et quietius viris religiosis potest conferre*,' etc. He therefore prayed that the defendants might warrant that gift to him because they wrongfully hindered his presentation.

[1] On the back of a skin numbered in a comparatively modern hand '8.' The roll is that to which Mr. Maitland has referred as B, under the head of Trinity Term, 4 Henry III. He has printed the case as No. 1418.

The defendants pleaded that Eudo de Mumby, father of Alan, was seised of the advowson (*advocatione*) in the time of Henry II, so that he presented a clerk, and that from Eudo the *jus illius advocationis* descended to Alan his son and heir, and from Alan to Beatrice, Mary, and Alice his heirs. They acknowledged that Alan, desiring the advancement of the House, and supposing 'ipsos canonicos posse habuisse ecclesiam illam in proprios usus,' did with that intention make the charter in favour of the House. It was not, however, at the time nor was it yet the pleasure of the Bishop of the Diocese (*loci*) that they should have that church '*in proprios usus*.' And inasmuch as it was expressed in the charter that Alan gave them that church, as any layman could give them that church, and no mention was made of the advowson (*advocatione*) in the charter, and it was to the interest of a layman to give the advowson and not the church, they prayed judgment whether the Prior could, on the ground of that charter, claim that advowson or that church against them, and whether they ought to warrant.

The Prior replied that Eudo was in fact seised as alleged, and after him his son Alan, but that Alan gave the right which he had, or could have, to the Prior's House, '*sicut laicus dare potuit*,' and the Prior also prayed judgment whether Alan could give the church.

Issue was joined on the point of law.

Judgment was given as follows:—'Because Robert and the others acknowledge the charter aforesaid and the gift (*donum*), and the aforesaid Alan gave whatsoever a layman could give *viris religiosis*, it is considered that the Prior has recovered that advowson (*recuperavit advocationem illam*) and that the defendants are in Mercy.'

If we turn to another part of Bracton[1] we find the points stated thus:—'Giving a church is widely different from giving an advowson, because one who gives an advowson transfers the church and the right of presentation itself, that is to say the seisin, when he is in seisin of the right of presentation. If, however, one give a church to any one who is admitted on presentation, the giver retains for himself the right of presentation and the seisin as the right of patronage, no matter to whom the gift may have thus been made, whether to a private person, to a religious House (*loco*) *in proprios usus*, or in any other way.'

This, it will be observed, is inconsistent with the decision in the case last cited. The Prior did recover the advowson which had been conveyed to his House, not by the use of the word 'advowson'

[1] Bract. 97 b. The Hobhouse MS. in Lincoln's Inn Library (ff. 189, 189 b) differs slightly, but not in any way materially, from the printed text. This passage seems to be practically a repetition of that cited above from Bract. 53.

(*advocatio*) in the charter or deed, but upon the interpretation of the word church (*ecclesia*) to mean or include the advowson.

Bracton elsewhere[1] asks and gives a sort of answer to the question as to how the Sheriff is to proceed when a writ of *Cape* issues upon default where an advowson is in demand: 'Since the *jus advocationis* is incorporeal, invisible, and intangible, how can that be taken into the hand of the lord the king which can neither be seen nor touched? The duty of the Sheriff, in that behalf, will be to proceed (taking with him good and lawful men of the neighbourhood) to the church of which the advowson is claimed, and there publicly to declare, in the presence of good men, that he seizes into the hand of the lord the king *that church*, and consequently that *jus advocationis* which is *in corpore ecclesiae*, although that right be incorporeal. And when he has taken into the hand of the lord the king the *corpus* which is visible and tangible, there is, as a consequence, taken that which is incorporeal, though it be invisible and intangible, for a right cannot exist without a subject or body in which it may be inherent (*cui insit*). And it is commonly said, Such an one has or demands *jus advocationis talis ecclesiae et non talis manerii*, and so it is not necessary that the manor should be taken [into the king's hand], although a church situated within any manor is of the appurtenances of the same manor.'

The same ground is again travelled over in yet another passage[2]:—'But whereas *jus advocationis ecclesiae* is incorporeal, and upon default of the tenant the Sheriff is sometimes commanded to take it into the hand of the lord the King, though it is incorporeal[3], invisible, and impalpable[4], how can it be taken into the hand of the lord the King, as this appears to be impossible? Answer:—In truth no right can exist without a body and a subject to which it is attached (*cui adhaereat*). If, however, it be said that the right is attached (*adhaereat*) to the *fundus* or tenement in which the church is situated, then it appears *prima facie* that the *fundus* ought to be taken and as a consequence the *jus advocationis ecclesiae illius*. But the *fundus* is not taken because the *jus advocationis* is not attached (*adhaeret*) to the *fundus* immediately, but through a medium, which is the church as constructed of wood and stones, and, as stated above, there is *jus advocationis* of such a church, and not *jus advocationis* of such a *fundus*, and therefore, inasmuch as the *jus advocationis* is attached (*adhaereat*) to the church, let the Sheriff be told

[1] Bract. 366. [2] Bract. 378, 378 b.

[3] The Latin word as printed is *incomparabile*, but the similar passage above indicates the true reading *incorporale*. In the Hobhouse MS. in Lincoln's Inn Library the word is written *incorporabile*, but with the letters *bi* struck out.

[4] There appears to be something wrong in the Latin text. The words 'et palpari non potest' seem to be merely a variation of the word 'inpalpabile' which precedes them, and either they or it ought probably to be omitted.

to take the church into the hand of the lord the king by a simple act of taking, and, as a consequence, he takes that which is inherent in (*inest*) the body, as may be seen with regard to the right of pasture and the like.'

If the various statements made by Bracton and the judgment given in the case cited by him are carefully compared, they appear to give a complete justification of Herle's remark that shortly before Herle's time it was not known what an advowson was, and that when the intention was to give an advowson it was expressed in the charter that the alienor gave the church. The passages now quoted from Bracton contain the following propositions, the two last of which are inconsistent with the two first:—

(1) That to give a church was, in fact, to make a single presentation to a church, upon which a Bishop would institute, and which would leave the future right of presentation (the advowson) with the giver.

(2) That giving the advowson was a different thing from giving the church, and that, if the advowson was to be given, it ought to be so expressed.

(3) That if one gave a church to a religious house *in proprios usus* without any mention of the advowson, the advowson would pass. (This is in accordance with the case which Bracton himself cites.)

(4) That if, in accordance with a writ of *Cape*, a Sheriff had to seize an advowson into the king's hand, the way to do it was to seize the church.

Surely Herle's words were fully justified and worthy of his great reputation. If they require any further confirmation, it is to be found in a comparison of proposition No. 4 with the form of the writ given by Glanvill and Glanvill's explanation. According to him the Sheriff was commanded to take not the church but '*praesentationem ecclesiae*'; according to him the Sheriff was to go to the church and declare that he had seized not that church but *praesentationem illius ecclesiae*[1]. What could better express the result of studying all this than the statement that men had not understood what an advowson was?

Bracton appears to have thought that the principles of Roman law, as he understood them, could be applied absolutely to mediæval notions and a mediæval state of society. He does not seem to have considered whether the Roman division of *res* into *res corporales* and *res incorporales* was adapted to the estates which might be held in various kinds of hereditaments, and still less whether the division was good in itself.

[1] Glanv. lib. iv. cc. 4–5.

From the point of view of Roman law the expression 'corporeal hereditament' is self-contradictory, that is to say if hereditament is to be understood as meaning anything more than *res*. If it is, as its etymology imports, and as it is usually understood, something that is capable of being inherited, it must involve the idea of the right of inheritance (*hereditas*) which according to Roman law was *res incorporalis*. The word hereditament, it is true, may be of later origin than Bracton's time, and he may have held to the word *res*. But the use of the word 'heirs' to give a fee simple was perfectly familiar to him, and it is very difficult to understand how he could have supposed that when *A* gave a manor to *B* and the heirs of *B* he gave only a *res corporalis*. Had it been possible to give *B* the manor in fee without the use of the word 'heirs,' it is easy to see that the gift might have been regarded as a gift of a *res corporalis* without any reference to any ulterior rights. But the use of the word 'heirs' gave two important rights which would not have been brought into existence without it; one the right of the purchaser in fee to aliene the fee, the other the right of his successive heirs to inherit in the absence of any alienation.

The knowledge which Bracton possessed of Roman law was derived directly or indirectly from the writings of Justinian. But the conveyance of a *fundus* (let us say a messuage and land) in the time of Justinian was not by any means similar to the conveyance of a messuage and land in Bracton's time. If *A* the Roman conveyed his *fundus* to *B* without any mention of heirs, *B*'s heirs would nevertheless inherit. But if *C* the Englishman gave his messuage and land to *B* without any mention of heirs, *B* acquired only a life estate, and his heirs would not inherit.

As Littleton puts it, a fee is the same thing as an inheritance [1]. But in the Roman law of Justinian's time the right of inheritance is placed in the very forefront of *res incorporales* [2]. Whatever difference, therefore, may have existed in Roman law between a corporeal thing (such as a *fundus*) and a right, that difference could not exist between a fee simple, a fee tail, or an estate for life in a messuage and land on the one hand, and a right on the other. The primary conception of the English law was that a man had not land but an estate in land; it might be a fee, or a bare freehold, or less; but whatever he had, it was the estate in the land and not the land itself. It was absolutely essential that the nature of the estate to be conveyed should be mentioned at the time of the transfer. No one could take an estate of inheritance without words to give

[1] Litt. sect. 1.

[2] Justin. Inst. lib. ii. tit. 2. § 2: 'Incorporales autem sunt quae tangi non possunt; qualia sunt ea quae in jure consistunt sicut hereditas,' etc.

him such an estate. But an estate is only a larger or smaller right according to the words of limitation.

If land be given to *A* and his heirs, it is immaterial, for the purposes under consideration, whether the future right of succession of *A*'s heirs be regarded, or the present right which vests in *A*. The effect is that *A* takes a right which he could not have without the operative words, and which right is transmissible to others. Give the land to *A* and the heirs of his body, and he has a less extensive right transmissible only in a more restricted manner. Make livery of seisin to *A* whom you enfeoff in fee or in tail, and the seisin enures to the particular estate or right conveyed. Give an estate for years to *A* with remainder to *B*, make livery of seisin to *A*, and the seisin enures to *B*'s remainder[1]. Give what estate you will, your words and your livery always give that estate only and cannot give the land itself.

The foregoing considerations seem to lead to the conclusion that no one can really deliver to any one else a corporeal hereditament any more than he can deliver an incorporeal hereditament. When we are told that seisin of land was given, we know that this is only a form of speech which is obscure from its brevity. No one ever had livery of the absolute seisin of land[2]. The nature of his seisin was defined by words of limitation expressing the extent of his rights, and if there were no such words his rights were still limited by the operation of law, and he might, as tenant for life, have been very sharply reminded of the fact by an action of Waste.

Language is but a very imperfect instrument for the conveyance of thought, and it may be that 'livery of seisin' is not a very happy expression as applied to an estate of inheritance in land, or in rent, or in an advowson. But when the words are carefully weighed, there does not appear to be any sufficient reason why they should not be used in relation to one just as much as in relation to another. They are, from a strictly logical point of view, equally inapplicable to all. It may, however, perhaps be hoped that enough has now been said to show how feoffment and livery of incorporeal hereditaments were possible just as far as though no farther than feoffment and livery of corporeal hereditaments.

L. Owen Pike.

[1] Co. Litt. 49 a, b.

[2] [I should prefer to say that seisin, *qua* seisin (= possession), was always absolute, and being really a matter of fact, could not be otherwise; but that the estate acquired was a matter of title, defined by the intent with which seisin was given.—Ed.]

NOTES ON THE ENGLISH LAW OF MARRIAGE.

THE question whether *A* is married to *B* is sometimes one of extreme difficulty. The answer may even depend upon the object with which the question is put. The marriage may be valid *in foro conscientiae*, though it is invalid at law, as where people are married in England according to the rites of the Church of England in a chapel which, unknown to them, has not been duly licensed for the solemnization of marriages. The marriage may be valid in one country and not in another. The marriage of the Duke of Sussex with Lady Augusta Murray was invalid in England; but it was probably valid in the Pontifical states, and possibly in some other countries. A marriage contracted between British subjects in a foreign country pursuant to the provisions of the Consular Marriages Acts is valid throughout the British dominions; while it is extremely doubtful whether it is valid elsewhere. A marriage may not confer on the children all the rights of legitimate children, as for instance a morganatic marriage contracted by a member of a Royal German house. Again, a marriage contracted according to the forms of a non-Christian community may not confer on the married pair or their issue the same rights as if it were a Christian marriage.

Meaning of Marriage.—There is a double ambiguity in the word marriage:

First, it may mean either a certain status, or the acts which produce that status. When marriage is spoken of as a contract, the word is used in the latter meaning. 'In truth very many and serious difficulties arise if marriage be regarded only in the light of a contract. It is indeed based upon the contract of the parties, but it is a status arising out of a contract, a status to which each country is entitled to attach its own conditions, both as to its creation and duration' (per Hannen J., *Sottomayor* v. *De Barros*, 5 P. D. at p. 101).

Secondly, marriage may mean either a Christian marriage or a non-Christian marriage, i.e., a polygamous marriage or a mere temporary union. The word marriage as used by English lawyers almost invariably means Christian marriage. Probably most if not all of the propositions laid down with respect to marriage in English law books and in this article are untrue, or at all events must not be assumed without further investigation to be true, with respect to non-Christian marriages. 'We regard it (Christian

marriage) as a wholly different thing, a different status, from Turkish or other marriages among infidel nations, because we clearly never should recognise the plurality of wives, and consequent validity of second marriages, standing the first, which second marriages the laws of those countries authorize and validate. This cannot be put on any rational ground, except our holding the infidel marriage to be something different from the Christian' (per Lord Brougham, *Warrender* v. *Warrender*, 2 Cl. & Fin. at p. 532).

Christian Marriage.—The phrase 'Christian marriage' requires explanation. It does not necessarily mean that any religious ceremony is necessary to the validity of the marriage, or is in fact performed. A marriage before a registrar in England, or a French Civil marriage, is a Christian marriage; and, as we shall see, a marriage without any religious ceremony was, and is in some places at the present day, valid according to Canon Law. It does not even imply that the spouses are Christians. A marriage celebrated between a Jew and an atheist in England, according to the rites of the Established Church, or before a registrar, is a Christian marriage. Perhaps for our purposes it may suffice to define 'Christian marriage' as the status acquired by a man and a woman who enter into a contract with the forms prescribed by law to live together, but not with any other persons, as husband and wife, from the time of contracting for the rest of their joint lives; or as defined by Lord Penzance in *Hyde* v. *Hyde & Woodmansee*, L. R. 1 P. & M. at p. 133, 'the voluntary union for life of one man and one woman to the exclusion of all others.' (See per Lord Hatherley (then Wood V.C.), *Harrod* v. *Harrod*, 1 K. & J. at p. 15.) It should perhaps be observed that a marriage contracted by a man and woman in a country where polygamy is allowed between persons professing a polygamous faith does not become a Christian marriage, because at the time of the marriage neither of the parties had another husband or wife (*Hyde* v. *Hyde*, L. R. 1 P. & M. 130).

Conflict between Canon Law and Common Law.—According to the doctrines of the Church before the Reformation, marriage was a sacrament; accordingly it followed that, although the question whether a marriage had in fact taken place could be determined by a lay tribunal, every question which turned on the validity of a marriage was exclusively a matter of ecclesiastical cognisance. After the Reformation marriage was no longer considered to be a sacrament, but no change in the law as to what facts rendered a marriage valid, nor as to what tribunal could determine whether it was valid or not, was made, save that appeals to Rome were prohibited.

Our enquiry naturally divides itself into two branches. We have

to enquire what constituted a marriage according to the law as administered by ecclesiastics, and further, whether that law was recognised as being valid by the Common Law Courts.

It is sometimes forgotten that even in times long before the Reformation, and even on matters purely ecclesiastical, the Common Law might differ from the law of the Church, and that when this was the case the former prevailed. See Hale, History of the Common Law, c. 2; per Tindal C.J., *The Queen* v. *Millis*, 10 Cl. & Fin. at p. 680; per Blackburn J., *Bishop of Exeter* v. *Marshall*, L. R. 3 Eng. & Ir. App. at p. 35; *Middleton* v. *Crofts*, 2 Atk. 650.

Coke has collected a large number of cases proving the truth of this assertion (see *Caudrey's Case*, 5 Rep. 1). One of the most celebrated instances occurred in the parliament held at Merton, 20 H. II, c. 9; see 2 Instit. 96. By the Canon Law (Decretals, *qui filii sunt legitimi*, c. 6), which in this respect differed from the Common Law, a child born before marriage of persons who then could lawfully and afterwards did marry, was accounted legitimate (Co. Litt. 244 b; 18 Ed. IV, 30 a). Questions of bastardy were tried by the bishop's certificate. At that parliament the bishops proposed that the Common Law should be altered so as to conform with the Canon Law, but 'Omnes Comites et Barones unâ voce responderunt; quod nolunt leges Angliae mutare quae hujusce[1] usitatae sunt et approbatae.' After the parliament of Merton 'special' bastardy[2], i. e. the question whether the child was born before its parents' marriage, was tried in the King's court; while 'general' bastardy, i. e. the question whether the child's parents were lawfully married, was, as theretofore, tried by the bishop's certificate. See 2 Instit. 99, Bro. Ab. 'Bastardy;' *Ilderton* v. *Ilderton*, 2 H. Bl. 145.

Another instance, not given by Coke, of the Canon Law not being enforced where it differed from the Common Law, will be found in 43 Ed. 3, 19, pl. 5. Kirton (a judge) says, '*Si feme elop de sa baron ove sa avowtour hors de pays, et ad issue ove son avowtour, ceo issue serra ajudg bastard per la ley de saint Esgl.*' Belknap (counsel) answered, '*Il sera adjudg mulier, si le baron demurt deins le quater miers, issint q'il poit venir a sa feme,*' quod non fuit negatum. See Co. Litt. 244 a. The law is now different, and a child may be held illegitimate on proof of non-access of the husband (*Morris* v. *Davies*, 5 Cl. & Fin. 163. See Nicholas on Adulterine Bastardy).

Canon Law[3].—According to the Civil Law, marriage is entered into

[1] *Sic* in 2nd Institute, 96 [*l.* hucusque].

[2] Both Cowell, Interp. and Blount, Law Dict., *s. voce* 'Bastardy,' say that special bastardy was a suit in the King's Court against one who calls another Bastard; but this is incorrect. It should be noted that general bastardy alleged against a person who was dead or an infant or not a party to the action, was tried *in pais* (2 Rolle at 586, see *Ilderton* v. *Ilderton*, 2 H. Bl. at p. 156).

[3] See as to the manner of citing the canonists 4 L. Q. R. 359.

by the consent of the parties. 'Nuptiae sunt conjunctio maris et foeminae, et consortium omnis vitae; divini et humani juris communicatio, *ff. de ritu nuptiarum l. nuptiae*' (Dig. xxiii, tit. 2, lib. 1). Canon Law, which was in some measure founded on Civil Law, adopted this view (Decretal 4. 4. 1, etc.), but held that the consent must be testified by words (Decretal 4. 1. 25[1]), which might either constitute a contract *de praesenti*, by which without anything else a valid marriage was made, or they might be a promise of a future marriage (*sponsalia*, see Co. Litt. 34 a) which could be rescinded (Decretal 4, tit. 1, c. 2 & 17), unless consummation took place.

It should perhaps be observed that the marriage of a lunatic, i.e. of a person not capable of understanding the nature of the contract that he is entering into (*Hancock* v. *Peaty*, L. R. 1 P. & M. 335; *Browning* v. *Reame*, 2 Phillim. 69; *Turner* v. *Meyers*, 1 Hagg. C. R. 414; *Portsmouth* v. *Portsmouth*, 1 Hagg. E. C. 355; *Hunter* v. *Edney*, 10 P. D. 93), as distinguished from a person whose mind is dull, but who understands that by marriage he undertakes to cohabit with no other person than the person to whom he is married (*Harrod* v. *Harrod*, 2 K. & J. 4), is void, on the ground that he is incapable of consenting; and that where the consent is obtained by intimidation or fraud, the marriage is void; *Miss Turner's Case*, 2 Lewin Cr. Ca. 1; *Wilkinson* v. *Wilkinson*, 4 N. of C. 295; *Fields Marriage Annulling Bill*, 2 H. L. C. 48; *Harford* v. *Morris*, 2 Hagg. C. B. 423; *Scott* v. *Sebright*, 12 P. D. 21. See as to evidence of consent *Re Alison's Trusts*, 23 W. R. 226.

The distinction between consent *de praesenti* and a contract *de futuro* is most clearly pointed out by St. Augustine, Decretum 2. 27. 2, c. 51, where he says, 'If a man engages his faith to a woman, in the way of promise, he ought not to marry another; but if he does marry another he should do penance for his breach of faith: nevertheless he must remain with her with whom he has married. But if he engage his faith in the way of consent, and afterwards marry another, he must dismiss the latter and adhere to the former.' See to the same effect Pope Alexander, Decretal 4. 4. 3 and 4. 5. 3.

That in the view of the Church words of consent are necessary, see Decretal 4. 1. 25, where Pope Innocent III says, 'In truth matrimony is contracted by the lawful consent of a man and of a woman; but in regard to the Church, words expressing a contract *de praesenti* are necessary.' See to the same effect in the Pupilla Oculi, 24 b, 'Marriage is the lawful union of man and woman, to wit, of their minds . . . the matter of this sacrament is the contracting persons themselves . . . the form is the words expressing mutual consent

[1] Unless the parties are deaf and dumb, where signs of consent are sufficient (Swinburne on Espousals, 204; *Harrod* v. *Harrod*, 1 K. & J. 4).

. . . no other minister of this sacrament is to be required distinct from the persons contracting; for they themselves, for the most part, administer this sacrament to themselves, either the one to the other, or each to him or herself.' See to the same effect Pupilla Oculi, pt. 8, De Sac. Mat.; Lancellottus, lib. 2, de Nuptiis.

That a promise *de futuro* followed by consummation made a valid marriage, see Decretal, lib. 4, tit. 1, c. 30, and lib. 4, tit. 5, c. 3; lib. 4, tit. 1, cc. 15 and 26.

Sir Wm. Scott in his luminous judgment in *Dalrymple* v. *Dalrymple*, 2 Hagg. Con. Rep. 54, states the rules of the Canon Law before the Council of Trent in the words following: 'The consent of two parties expressed in words of present mutual acceptance, constituted an actual and legal marriage, technically known by the name of *sponsalia per verba de præsenti*, improperly enough, because *sponsalia*, in the original and classical meaning of the word, are preliminary ceremonials of marriage, and therefore Brower justly observes, *jus pontificium nimis laxo significatu, imo etymologiâ invitâ ipsas nuptias sponsalia appellavit*. The expression however was constantly used in succeeding times to signify *clandestine* marriages, that is, marriages unattended by the prescribed ecclesiastical solemnities, in opposition, first, to regular marriages; secondly, to mere engagements for a future marriage, which were termed *sponsalia per verba de futuro*, a distinction of *sponsalia* not at all known to the Roman civil law. Different rules, relative to their respective effects in point of legal consequence, applied to these three cases—of regular marriages—of irregular marriages—and of mere promises or engagements. In the regular marriage everything was presumed to be complete, and consummated both in substance and in ceremony. In the irregular marriage everything was presumed to be complete and consummated in substance but not in ceremony; and the ceremony was enjoined to be undergone as matter of order. In the promise or *sponsalia de futuro* nothing was presumed to be complete or consummate, either in substance or ceremony. Mutual consent would release the parties from their engagement; and one party, without the consent of the other, might contract a valid marriage, regularly or irregularly, with another person; but if the parties who had exchanged the promise had carnal intercourse with each other, the effect of that carnal intercourse was to interpose a presumption of present consent at the time of the intercourse, to convert the engagement into a regular marriage, and to produce all the consequences applicable to that species of matrimonial connection.'

Before the Council of Trent a marriage was regular if it was solemnized (1) after the publication of banns on three successive Sundays or holidays, (2) in the presence of at least two witnesses,

(3) before the parish priest or another priest with the license of the bishop, (4) in the accustomed place; and although a marriage without some or any of these formalities was valid, it exposed the persons to ecclesiastical censure. See Lyndw. lib. iv. tit. 3, 'Quicunque matrimonia,' Gloss (g) Clandestina; (x) Statutis a jure.

The Council of Trent, which is considered by the Canonists as applying to Roman Catholic marriages only (Evidence, Sussex Peerage Case, 105, 106, 119), effected a very serious change in countries in which it was promulgated, as it rendered all marriages void not celebrated 'coram parocho and two witnesses.' (See the text of the decree, Evidence, Sussex Peerage Case, 131 et seq.) It also required the marriage to be preceded by banns, but the omission of the banns only renders the marriage clandestine (*Herbert* v. *Herbert*, 2 Hagg. Consist. Rep. at 274 n.).

A priest who is not *parochus* may officiate with the license of the bishop, and, apparently, a *parochus* who is only in minor orders can officiate.

Common Law.—It was the common though not universal opinion of English lawyers before the decision in *The Queen* v. *Millis*, 10 Cl. & Fin. 534, that in cases not falling within Lord Hardwicke's Marriage Act, 26 Geo. II. c. 33, a contract *per verba de praesenti* or *per verba de futuro subsequente copulâ* was a valid marriage. A marriage of this nature did not produce all the effects of a regular marriage. On the death of the wife the Ecclesiastical Court generally (for the practice was, perhaps, not quite uniform) declined to grant administration of the wife's effects to the husband, possibly on the ground that he was in contempt of the Ecclesiastical Law, owing to his having neglected the ceremonies enjoined by the Church; on the death of the husband the Courts of Common Law declined to recognise the wife's right to dower. But the children of a marriage of this nature were legitimate, so as to be able to inherit real estate and to take personal estate under the Statute of Distributions. The existence of such a marriage rendered a subsequent marriage void, even if the latter was solemnized *in facie Ecclesiae*; many instances will be found of a divorce being granted to persons married *in facie Ecclesiae*, owing to the existence of a prior marriage of this nature contracted by one of them. The Ecclesiastical Courts could punish people who contracted marriages otherwise than *in facie Ecclesiae* (see a curious instance given in Hale's Ecclesiastical Precedents, ccxcv. p. 89, cited 2 Stephen, Hist. Criminal Law, 412), and could enjoin the parties to solemnize their marriage *in facie Ecclesiae*.

The authorities for these statements, which are too many to cite, will be found collected in *The Queen* v. *Millis*, 10 Cl. & Fin. 534, and

Beamish v. *Beamish*, 9 H. L. C. 274. *The Queen* v. *Millis* decided that the opinion stated above was incorrect, and that although a contract *per verba de praesenti* could not be dissolved by the parties themselves, it did not constitute a marriage unless it was entered into in the presence of a priest, or, since the Reformation, of a priest or of a deacon of the English Church. This decision has been the occasion of much and bitter controversy, but after the decision of *Beamish* v. *Beamish* it must be considered as being a correct statement of the law, even by those who consider that it is historically incorrect. These two cases, and the authorities therein cited, deserve most attentive study by every person who wishes to understand the history of the English law of marriage.

According to the law of Scotland a clandestine marriage is valid for all civil purposes, but it exposes the parties to punishment.

According to the old French law, a marriage *per verba de praesenti* conferred no civil rights, but it enabled either party, on application to the Ecclesiastical Court, to obtain a decree for the solemnization of the marriage *in facie Ecclesiae*. See 2 Continuation des Causes Célèbres, 111.

In America the text-writers have with unanimity concurred in supporting the rule as generally understood in England before the decision in *The Queen* v. *Millis*, but the decisions, which are collected in 1 Bishop on Marriage and Divorce, § 279, are not quite uniform. The Supreme Court was equally divided in *Jewell* v. *Jewell*, 1 Howard 219, but in a later case, *Meister* v. *Moore*, 6 Otto (96 U. S.) 76, it expressed the opinion that a contract *per verba de praesenti* constituted a marriage at common law.

Validity of Marriage as depending on form.—It is a rule not only of English law, but I believe of the law of every civilized country, that the question whether a marriage is valid (so far only as the form is concerned) depends upon the law of the place of celebration. *Brook* v. *Brook*, 9 H. L. C. 193; per Lord Brougham, *Warrender* v. *Warrender*, 2 Cl. & Fin. at p. 531; *Bell* v. *Graham*, 13 Moo. P. C. C. 242; *Kent* v. *Burgess*, 11 Sim. 361; *Ilderton* v. *Ilderton*, 2 H. Bl. 145; *Lacon* v. *Higgins*, 3 Stark, N. P. C. 178; *Butler* v. *Freeman*, Amb. at p. 303; *Dalrymple* v. *Dalrymple*, 2 Hagg. C. R. 54; *Herbert* v. *Herbert*, 2 Hagg. C. R. 263; *Scrimshire* v. *Scrimshire*, 2 Hagg. C. R. at p. 417; *Middleton* v. *Janverin*, 2 Hagg. C. R. 437; *Conway* v. *Beazley*, 3 Hagg. E. C. 639; *Swift* v. *Kelly*, 3 Knapp P. C. C. 257; 2 Kent Comm. 78; Sanchez, lib. 3, disp. 18 n. 26; Huber de Conf. Leg. lib. 1, tit. 3, § 8; J. Voet, lib. 23, tit. 2, n. 4; Merlin Rep. tit. Marriage, s. i; Boullenois, tom. I. tit. 2, c. 3, obs. 23; 1 Hertius Opera de Coll. Leg. sec. 4, § 10; Code Civil, art. 47; 9 Recueil général, par Sirey, part I. 375; Recueil général, par de Villeneuve

et Cassette, 1842, part I. 321; *Steele* v. *Braddell*, Milw. Ec. Rep. Ir. 1; *Medway* v. *Needham*, 16 Mass. Rep. 157.

It was at one time considered that a marriage contracted according to the English form by English people in a foreign country in which they were only temporarily resident and had no *animus morandi*, and in which a marriage in that form was invalid, was good (*Harford* v. *Morris*, 2 Hagg. C. R. 423), but this doctrine must be considered as overruled.

It was at one time doubted whether marriages were good where the parties domiciled in one country went to another for the purpose of evading restraints (as to form) to which their marriage would be subject according to the law of their domicile. See Mr. Hargrave's note, Co. Litt. 79 a; per Lord Mansfield, *Robinson* v. *Bland*, 2 Burr at p. 1079, 1 Wm. Bl. at p. 259, citing Hub. de Confl. Leg. lib. 1, tit. 3, sec. 10. But this view is not now held; *Compton* v. *Bearcroft*, cited in *Middleton* v. *Janverin*, 2 Hagg. C. R. at p. 444 (n.); *Grierson* v. *Grierson*, 2 Hagg. C. R. 99; *Brook* v. *Oliver*, 2 Hagg. C. R. 376; *Ex parte Hall*, 1 Rose 30; *Harford* v. *Morris*, 2 Hagg. C. R. 423; *Simonin* v. *Mallac*, 2 Sw. & Tr. 67; *Butler* v. *Freeman*, Amb. 301: see Sanch. de Matr. lib. 3, disp. 18 n. 29.

There are a few exceptions to the rule.

Marriages celebrated in the chapel of an Embassy (*Este* v. *Smith*, 18 Bea. 112), where at least one of the parties was a subject of the Ambassador's country (see *Pertreis* v. *Tondear*, 1 Hagg. C. R. 136; *Lacy* v. *Dickinson*, 2 Hagg. C. R. 386 n.), or in a place occupied by British troops where one at least of the parties was a British subject (*Rex* v. *Brampton*, 10 East 282; *Burn* v. *Farrar*, 2 Hagg. C. R. 369; *Ruding* v. *Smith*, 2 Hagg. C. R. 387), were always held valid in England.

The reason why these marriages were held good appears to be that by a fiction of law the residence of an Ambassador is accounted part of his own country, and that British troops on foreign service impliedly carry English law with them.

Marriages in an English factory abroad were always held valid in England. See *Ruding* v. *Smith*, 2 Hagg. C. R. 385.

Marriages solemnized by a minister of the Church of England in the chapel or house of any British Ambassador or Minister residing in the country to the Court of which he is accredited, or in the chapel belonging to any British factory abroad, or in the house of any British subject residing in such factory, or solemnized within the British lines by any chaplain or officer, or other person officiating under the orders of the commanding officer of a British army serving abroad, are declared to be as valid in law as if the same had been solemnized within His Majesty's dominions with a due observance of all forms required by law, 4 Geo. IV. c. 91. The Act

applies to cases where only one of the parties is a British subject (*Lloyd* v. *Petitjean*, 2 Curt. 251).

It should perhaps be observed that a marriage at the British Embassy at Paris is not recognised as valid by the law of France if one of the parties is not a British subject. And the Royal Commissioners on the Law of Marriage are of opinion, p. xxxviii, that a marriage celebrated in the house or chapel of a foreign ambassador accredited to Her Majesty, between a British subject and a subject of a foreign power represented by the ambassador, not fulfilling the requisites of British law, could not be recognised as legally binding upon the British subject for civil purposes in this country.

It has been decided that the marriage of an officer is good, though the army is not serving in a country in a state of actual hostility (*The Waldegrave Peerage Case*, 4 Cl. & Fin. 649).

By the effect of 12 & 13 Vict. c. 68, as amended by 31 & 32 Vict. c. 61, marriages between persons one of whom at least is a British subject, celebrated after certain notices by or in the presence of a consul-general or consul duly authorized in that behalf by the Secretary of State, and any person acting or legally authorized to act in the place of such consul, or, if there be no resident British consul, any vice-consul or vice-consular agent duly authorized in that behalf by the Secretary of State, are valid.

It should perhaps be observed that, with the possible exception of cases where the law of the country in which the consulate is situated affords no means by which the parties can go through the form of marriage, marriages of this nature would probably be considered void in all places outside the British dominions, unless perhaps both of the parties were British subjects. See the Appendix to the Report of the Royal Commission on the Laws of Marriage, pp. 191–193.

An Act of Congress of 1860 makes provision for the celebration of marriages before a consular officer of the United States 'between persons who would be authorized to marry if residing in the District of Columbia.'

The above stated provisions as to Consular marriages appear to offer considerable facilities to immorality. Suppose that a British subject *A* marries an American *B* before an American consul in England, this marriage is void according to English law but would be valid in the United States. Then let in *B*'s lifetime *A* marry a Frenchwoman *C* before the British consul in France, this marriage would be good according to the English law; it would, I presume, be void according to American and according to French law. Lastly, let *A* in the lifetime of *B* and *C* marry a Frenchwoman *D* in France according to French law, the latter marriage will be

void both in the United States and in England, in both of which countries *A* has a lawful wife; but I presume that *D* would be recognised as the wife of *A* in every other country. On the death of *A* his immoveable property in the United States would devolve as if *B* was his wife, that in the British dominions would devolve as if *C* was his wife, and that in other countries as if *D* was his wife, while the question which marriage would be recognised as valid for regulating the rights to his personalty would depend upon his domicile at his death.

I can find no authority on the subject of marriages on board ship. The Merchant Shipping Act, 17 & 18 Vict. c. 104, contemplates marriages taking place on board British merchant ships, as it makes provision for their being entered on the official Log-book (s. 282) and for their being contained in the return directed to be made in certain cases to the Board of Trade (s. 273).

By 42 & 43 Vict. c. 29 all marriages, both the parties being British subjects, which before the passing of the Act had been solemnized or contracted *per verba de præsenti* on board one of Her Majesty's ships on a foreign station in the presence of the officer commanding such vessel, are declared valid. It appears from the Report of the Marriage Law Commission, p. li, that marriages of this nature are sometimes celebrated without the presence of any minister of religion: but see the Admiralty regulations of 29th July, 1886.

It is I think clear that a marriage on a British man-of-war, or on a British merchant ship, celebrated on the high seas in the presence of a priest, is valid; possibly in some cases such a marriage contracted *per verba de præsenti* without the intervention of a priest may be valid according to the doctrine of *Maclean* v. *Christall*, discussed *post*, p. 15. Some doubts as to the validity of marriages contracted in the presence of a priest on a merchant ship may arise from the fact that no such marriage was known to the Royal Commissioners to have taken place, although it would have been easy to adopt a marriage of this nature for the purpose of evading the statutory provisions as to marriage. In fact 'Guernsey appears to have preceded Gretna Green as a place of refuge from the clogging preliminaries to marriage required by Lord Hardwicke's Act.' (Hubback on Succession, 331 n.) If a marriage of the nature under discussion was valid there would have been no reason why the parties should have gone all the way to Guernsey, they might have taken a priest on board and have been married as soon as they had reached the high seas.

It is impossible within the limits to which this paper is restricted to discuss the very difficult questions that arise as to the validity of marriages on board British ships in foreign waters. Probably it

will be held that a marriage on a ship of war between British subjects, which would have been valid if solemnized on the high seas, would be valid if solemnized in foreign waters, and that a marriage, one of the parties to which is a subject of the state having jurisdiction over the waters in which the ship is, even if good according to English law, would be held invalid by the law of that country. It is also probable that the validity of marriages on board a British merchant ship in foreign waters depends upon the *lex loci*.

The questions as to the validity of marriages contracted in a foreign country or a colony where, either owing to the state of the law or owing to the difficulty in obtaining the presence of a priest, it is impossible or difficult to go through the form of a Christian marriage according to the law of the place of celebration, will be considered hereafter.

Validity of marriage as depending on the domicile of the parties.—It is generally stated by writers of authority that the capacity of the parties to contract marriage, i. e. that the question whether their marriage, good in form, is valid or not, depends upon the law of their domicile. The rule when stated in this form is subject to some exceptions according to English law, and is, I believe, not accepted in its full extent in France (see Code Civil, Art. 3), and possibly in some other countries. The English law as to the capacity of persons to contract marriage is stated in the following rules:—

Where a marriage good in form is invalid according to the law of the place of celebration owing to a want of capacity, according to that law, in either of the parties to contract marriage or to contract marriage without certain consents which are not given, it is invalid everywhere. *Scrimshire* v. *Scrimshire*, 2 Hagg. C. R. 395; *Middleton* v. *Janverin*, 2 Hagg. C. R. 437; *Conway* v. *Beazley*, 3 Hagg. E. R. 639: see per Cresswell J., *Simonin* v. *Mallac*, 2 Sw. & Tr. at p. 83; *Mette* v. *Mette*, 1 Sw. & Tr. 416.

Notwithstanding that a marriage is good in form, still if both of the parties are under personal incapacity to marry according to the law of their domicile the marriage is invalid. *Sottomayor* v. *De Barros*, 3 P. D. 1, reversing S. C. 2 P. D. 81; *Brook* v. *Brook*, 9 H. L. C. 193; Hub. de Conf. Leg. bk. 1, tit. 3, s. 10.

On the other hand, where a person domiciled in England contracts a marriage in England with a person domiciled abroad, who labours under a personal incapacity according to the law of his domicile, which is not a personal incapacity according to English law, the marriage is valid. *Sottomayor* v. *De Barros*, 5 P. D. 94 (compare S. C. 3 P. D. 1); *Simonin* v. *Mallac*, 2 Sw. & Tr. 67.

According to English law the consent of parents or guardians is part of the form of the marriage, and is not a matter affecting the personal capacity of the parties to contract marriage. Per Cotton L. J., *Sottomayor* v. *De Barros*, 3 P. D. at p. 7; *Compton* v. *Bearcroft* cited 2 Hagg. C. R. 444 (n.); *Grierson* v. *Grierson*, 2 Hagg. C. R. 99; *Simonin* v. *Mallac*, 2 Sw. & Tr. 67; *Steele* v. *Braddell*, Milw. E. R. (Ir.) 1. I have stated the rule as laid down by Cotton L. J., but possibly it only applies to cases where, according to the law of his domicile, the party may in some way or another marry without consent (Westlake, International Law, 55).

A person who is under a personal incapacity arising from a penal law of his domicile, can contract a valid marriage in England. *Scott* v. *Attorney-General*, 11 P. D. 128. I feel some doubt as to what the Court held the domicile of Mrs. Scott to be in this case, probably it was English at the time of her marriage in England. Consider *Kynnaird* v. *Leslie*, L. R. 1 C. P. 389. Apparently the marriage of the Duke of Sussex with Lady Augusta Murray, which was invalid in England, owing to the provisions of the Royal Marriage Act, 11 Cl. & Fin. 85, would have been considered valid in Rome where it was contracted. See the evidence of Dr., afterwards Cardinal, Wiseman in the Minutes of Evidence in the *Sussex Peerage Case*.

Impossibility to contract marriage according to form of place of celebration.—We now proceed to the consideration of a question which presents great difficulty, namely, How is it possible for persons to contract a Christian marriage, where they are unable to satisfy the forms prescribed for Christian marriage by the law of the place where the marriage takes place, or where they are in a heathen country where no forms are prescribed for a Christian marriage?

The following appear to be the considerations by which we must be guided when we seek the answer to this question:—

First.—Marriage is a natural status irrespective of the provisions of positive law (*Lindo* v. *Belisario*, 1 Hagg. C. R. at p. 230; *Dalrymple* v. *Dalrymple*, 2 Hagg. C. R. at p. 63; Merlin Rep. tit. Marriage S. 1); it is impossible to suppose that any Christian community, or even any non-Christian community knowing the difference between right and wrong, can intend to condemn people to pass their lives either in a state of celibacy or in a state of immorality. At all events if this is the law of any state, an English Court will not apply it to the marriage of a domiciled Englishman.

Secondly.—Subject to the provisions of positive law, the marriages of Christians are governed by the Canon Law. The Canon Law is the basis of the marriage law all over Europe, and the only question is how far it has been receded from by the laws

of any particular country,' per Eldon C., *Macadam* v. *Walker*, 1 Dow. at p. 181. 'The Canon Law is the basis of the law of Scotland as it is of the marriage law of all Europe, and whether that law remains entire or has been varied, I take it to be a safe conclusion that in all instances where it is not proved that the law of Scotland has resiled from it, the fair presumption is, that it continues the same,' per Sir W. Scott, *Dalrymple* v. *Dalrymple*, 2 Hagg. C. R. at p. 81. By 25 H. VIII. c. 19, repealed by 1 & 2 Phil. & M. c. 8, and revived by 1 Eliz. c. 1. s. 6, which is still in force, a commission was to be appointed to review ecclesiastical laws in general, and it was provided that until such review should be made, which never happened, 'such canons, constitutions, ordinances and synodals provincial, being already made, which be not contrariant or repugnant to the laws, statutes, and customs of this Realm, nor to the damage or hurt of the King's Prerogative Royal, shall now still be used and executed as they were afore the making of this Act.'

Assuming the dicta above cited to be correct, it appears that the sole question for consideration where a Christian marriage is alleged to have been contracted in a country where the positive law affords no means by which the parties can intermarry is whether the marriage is good according to the Canon Law. The parties may be unable to comply with the provisions of the *lex loci* for either of the reasons following.

(1) They may be in a Christian state, but may belong to a denomination of Christians for whose marriage the laws of that state make no provision. For instance, no provision for the marriage of Protestants was formerly made in Pontifical states, or is now made in some parts of South America. (See Report on Foreign Marriages, App. 1899.)

(2) They may be in a Christian state, the law of which imposes some highly unreasonable restraints on marriage.

(3) They may be in a non-Christian state, where no provision is made for the marriages of Christians.

(4) It may happen that though the marriage takes place in a state where the law provides a form of marriage competent to the parties, they are under a physical impossibility of complying with that form; this has happened in the British colonies.

Applying the considerations above stated to the first case, it has been held that a marriage between protestants in the Pontifical States performed by a clergyman of the Church of England was valid. *Anon.* (said to be *Lord Cloncurry's Case*), Cruise on Dignities, 276. § 85. Probably a marriage *per verba de præsenti* between protestants in the Pontifical states would have been valid. See the Minutes of Evidence in the *Sussex Peerage Case*.

On the same principle marriages between Jews celebrated according to Jewish rites in England have been supported; *Goldsmid* v. *Bromer*, 1 Hagg. C. R. 324; *Lindo* v. *Belisario*, 1 Hagg. C. R. 216; *D'Aguilar* v. *D'Aguilar*, 1 Hagg. E. R. 773. See Selden. Ux. Eb., and as to the existing law, 6 & 7 Will. IV, c. 85; 19 & 20 Viet. c. 119, s. 21.

In the second case, where the law of a country imposes unreasonable restraints on marriage, Lord Stowell seems to have been of opinion that, where the foreign law fixed the marriageable age at an advanced time of life, a marriage in that country between British subjects domiciled in England would not be invalidated on the ground of not having attained that age; *Ruding* v. *Smith*, 2 Hagg. C. R. 371. In the same case Lord Stowell points out that in cases where the *lex loci* required an abandonment of religious opinions as a condition before marriage, English law would disregard the *lex loci*.

It should perhaps be observed that the fact of a Christian man in a non-Christian country going through the form of a marriage according to the *lex loci*, with a non-Christian native, cannot by itself be evidence whether he wished to contract a non-Christian marriage or a Christian marriage *per verba de præsenti*, as if the latter was his intention he may have had to go through the form of a non-Christian marriage before he could obtain possession of his bride. It might be thought that a distinction must be drawn in the third and fourth cases between places in and out of the British Dominions, on the ground that where the parties are in the British Dominions, they take Common Law with them, and that therefore the marriage must necessarily take place before a Roman Catholic priest or a minister of the English Church; *The Queen* v. *Millis*, 10 Cl. & Fin 534.

It is said (2 P. W. 74) to have been decided by the Privy Council 'that if there be a new and uninhabited country found out by English subjects, as the law is the birthright of every subject, so wherever they go they carry their laws with them, and therefore such new country is to be governed by the laws of England. . . . Where the King of England conquers a country he may impose on the inhabitants what laws he pleases, and until he does so the laws and customs of the conquered country shall hold place; unless where they are contrary to our religion, or enact anything that is *malum in se* or are silent; for in all such cases the law of the conquering country shall prevail.' It is obvious that if the conquered country is polygamous the necessity of the case shows that Christians must take the Christian marriage law with them. It is impossible to discuss within the limits of this article the general question how far Englishmen, when they carry English law with them, carry the whole of that law. Lord Mansfield said (*Campbell* v. *Hall*, Lofft at

p. 710), 'It is absurd that in the colonies they should carry all the laws of England with them; they carry only such as are applicable to their situation.' See this question discussed, *The Mayor of Lyons* v. *The East India Co.*, 1 Moo. I. Ap. 175; *Att. Gen.* v. *Stuart*, 2 Mer. 143; *Adv. Gen. of Bengal* v. *Ranee Surnomoye Dossee*, 2 Moo. P. C., N. S. 32; *Re Bishop of Natal*, 3 Moo. P. C., N. S. 115; *Whicker* v. *Hume*, 7 H. L. C. 121. The following cases appear to show that the decision in *The Queen* v. *Millis* does not necessarily apply to colonial marriages.

It has been decided in *Maclean* v. *Christall*, Per. Or. Ca. 75, S. C. 7 N. of C. App. xvii. that English people in a colony do not necessarily carry the whole Common Law with them, and that they only take so much of it as is reasonably applicable to their state and condition. See a dictum to the same effect, *Connolly* v. *Woolrich*, 11 Low. Can. Jur. 197. *Maclean* v. *Christall* was an action for crim. con., an action in which the marriage must be strictly proved, *Morris* v. *Miller*, 2 Burr. 2057. The marriage took place in India, before an Independent minister who had not received Episcopal Ordination, in the house of the lady's father, and was upheld, on a special case, by the Supreme Court in Bombay as a marriage *per verba de præsenti*. The decision was not appealed from, and a divorce *a mensâ et thoro* was obtained by the husband in the Consistory Court of London on the 20th January, 1851. A Divorce Bill was introduced into Parliament, and passed the House of Lords, though it never received the Royal assent[1]. A report of the proceedings in the House of Lords will be found in the Times, 17th March, 1851. No discussion appears to have taken place in the House of Lords as to the validity of the marriage, which was proved by the evidence of the lady's father to have taken place in his house. It should perhaps be observed that the marriage took place in Surat, where there was a British Chaplaincy which was vacant at the time of the marriage, though a clergyman of the Church of England was nominated chaplain the day after, and reached Surat about three weeks after the marriage. See *Catterall* v. *Catterall*, 2 Rob. E. R. 580.

A careful comparison of *Re Bethell*, 38 Ch. D. 220 with *Connolly* v. *Woolrich*, 11 Low. Can. Jur. 197 tends to show that the principles here laid down may be safely applied to the third and fourth cases. In *Re Bethell* a Christian went through the form of marriage according to the custom of the Baralong tribe, at Mafeking, in Bechuanaland, where polygamy prevails, with *T*, a Baralong girl: *B* positively refused to marry *T* either in a Wesleyan chapel at Mafeking or in an English church at Kimberley, which was not far off. *B* constantly cohabited with *T* in the Baralong country till his death,

[1] I do not know whether by reason of the death of one of the parties or otherwise.

which happened a few months after the marriage; and though he kept up constant communication with his relatives at home he never mentioned his marriage to them, add to which that he never introduced *T* to any European as his wife. By his will *B*, who had substantial property in England, directed that his child by *T* should be brought up and educated on the proceeds of thirty heifers, a provision which appears to be inconsistent with a belief on the part of *B* that the issue of his marriage with *T* would be legitimate. In other words, the whole evidence showed that *B* considered that his marriage with *T* was not a Christian marriage, but was merely a polygamous marriage, and there was no evidence that *T* considered, or had any grounds for considering, it anything else. The facts in *Connolly* v. *Woolrich*, 11 Low. Can. Jur. 197 were very different. *C*, a Christian residing at Riviere Aux Rats in Athabaska married an Indian woman, *S*, according to the custom of the Cree tribe, who admit of polygamy and divorce; but it was proved that it was not the custom of Europeans in the position of *C* to discard wives married in this manner. In order to have contracted a marriage before a priest or a magistrate *C* would have had to have travelled between three and four thousand miles in canoes and on foot. *C* cohabited for twenty-eight years with *S* at several posts in the North West Territory and in Montreal, and introduced her to Europeans as his wife. During this time she was called Mrs. *C*, and her children by *C* were always acknowledged in public, educated, and some of them were baptized as legitimate; but one was, with the consent of *C*, baptized as illegitimate. During the lifetime of *S*, *C* contracted a Christian marriage with *W*; afterwards his children by *S* were reputed to be illegitimate. After the death of *C* it was held that his surviving child by *S* was legitimate on the ground that his marriage with *S* was valid as a contract *per verba de praesenti*. *Johnson* v. *Johnson's Administrator*, 30 Missouri S. R. 72, was very similar in the facts to *Connolly* v. *Woolrich*, except that no evidence was given as to any difficulty in contracting a Christian marriage, the distinction being that by the Statute Law of Missouri it was only necessary to prove a marriage *de facto*, even if it was null in law, to render the children legitimate. The Court was of opinion that the fact of the marriage being able to be, and having been in fact, dissolved by the husband at his pleasure, did not prevent it from being a marriage *de facto*.

Hyde v. *Hyde*, L. R. 1 P. & M. 130, only shows that a polygamous marriage is not recognised by English Law as a valid marriage in a suit by one of the persons against the other, for the purpose of enforcing matrimonial duties or obtaining relief from matrimonial obligations, but the Court carefully guarded itself against professing

to decide upon the rights or obligations of the issue of a polygamous marriage, or the rights or obligations in relation to third parties which people living under the sanction of such unions may have created for themselves.

Re Alison's Trusts, 23 W. R. 226, appears to be in opposition to the views here laid down. The friends of *V*, an Armenian woman probably domiciled in Persia, applied to the Armenian priests to marry her to *O*, the British Vice-Consul at Teheran, who from his name must have been an Englishman. The priests refused on account of her pregnancy. Shortly afterwards *V* and *O* were privately married by a Roman Catholic priest. Malins V. C. decided that the marriage was invalid; he thought that as *O* must have known of 12 & 13 Vict. c. 68, under which he could have contracted a marriage lawful in England, and as he did not avail himself of it, it was evident that he never intended to marry *V*. But the Vice-Chancellor further says, 'By the law of the Roman Catholic Church one of the parties must have been a Roman Catholic, and there was no pretext for saying that either was a Roman Catholic. The laws of the country were not complied with.' Unless there is some error in the report, the decision seems incorrect. In England we have always recognised a marriage contracted before a Roman Catholic priest as valid, except in cases where such marriages are prohibited by positive law.

The following cases may also be referred to as showing that marriages celebrated by a clergyman of the Church of England (*Limerick* v. *Limerick*, 11 W. R. 503), or between Roman Catholics celebrated by a Catholic priest (*James* v. *James*, 30 W. R. 232), in a colony not governed by a special law are valid. That the *lex loci* of a non-Christian state will not be held to bind Christians in all respects, see *Kojahs & Memon's Case*, Per. Or. Ca. at p. 127.

Assuming that the views here advocated are correct, and that marriages *per verba de praesenti* by domiciled English people contracted in the colonies or in non-Christian states may under the circumstances be valid, the further question arises, Do they have all the effects of a valid marriage, or do they have only the effects which marriages of this nature contracted in England before Lord Hardwicke's Act were considered to have before the decision in *The Queen* v. *Millis*?

The former appears to be the correct view. *The Queen* v. *Millis* shows that marriages of that nature contracted in places governed by the Common Law are absolutely void, so that in cases where they are now held valid they are valid independently of the Common Law, and therefore must have all the effects of a valid marriage.

HOWARD W. ELPHINSTONE.

THE REFORM OF COMPANY LAW.

THE Lord Chancellor has made a resolute attempt to bind that modern Proteus the company promoter. One may fancy Themis standing by with the words of advice and encouragement:

> 'Quanto ille magis formas se vertet in omnes,
> Tanto, nate, magis contende tenacia vincla.'

The attempt is well meant, and has been ably and perseveringly pressed; but there is a growing conviction abroad that the 'tenacia vincla' of the Bill will be but ropes of sand as far as the promoter is concerned, while they may prove real fetters on legitimate enterprise. The Associated Chambers of Commerce and the Incorporated Law Society, no less than Lord Bramwell and Lord Herschell, concur in condemning the measure, while fully sensible of the evils at which it is aimed.

The Limited Liability Acts have on the whole been highly beneficial. More than six hundred millions of capital, the contributions of co-operating units, have been poured into new channels of industry, and trade has been enormously stimulated. Whatever else may be done there will be no going back so far as the principle of limited liability is concerned. But it is equally certain that the Limited Liability Acts has been scandalously abused. Companies are now being formed at the rate of nearly 1900 a year, and the number is steadily growing. Of these an average of 50 per cent., or one half, are, according to the Registrar of Joint Stock Companies, abortive. If anything the proportion must be larger. Out of a total of 28,563 companies registered since 1862, only 11,001 are now carrying on, or believed to be carrying on, business. Two evils have resulted from this multiplication of unsound companies, (i.) Injury to trade by illegitimate competition, and (ii.) Loss to investors. Notably in the cotton trade, promoters, though no legitimate opening exists, get up companies for their own benefit, and run up mills with borrowed capital, thus swamping the market by over-production and destroying legitimate trade. In the shipping trade the 'ocean tramps' of the single ship companies have ruined the freight market. The Commission on the Depression of Trade (1886) reported that it was 'most desirable that the creation of unsound companies should be checked, and the *bona fides* of promoters ensured,' but offered no suggestion other than the questionable one of doubling the fees on registration. The losses to investors

during the last 30 years by company speculation are computed by the Registrar at 200 millions. Limited liability gave an immense impulse to such speculation, but limited liability was not its cause. Its cause is the aleatory or gambling instinct which is found no less strong in the civilized man than in the savage, and which, when it appears in a clergyman, we describe as a desire for a high rate of interest. Given this elemental passion of human nature with unlimited opportunities, sound and unsound, for the investment of capital, and you have the genesis of the company promoter, a new variety of the 'coneycatchers, cozeners, and crossbiters' of the Elizabethan age. Company promoting has now become a recognised and profitable profession. Most people know by this time how it is managed. Anything will do for the company monger—a gold mine, a patent, or a foreign concession. If worthless so much the better, because it can be acquired more cheaply. A memorandum signed by seven business friends of the promoter, or his own office clerks, is registered, and lo! a company with a nominal capital of perhaps £100,000 is created, and the strings of the puppet can be pulled at will. Ornamental directors are easily to be found in the city who, for a consideration in cash or shares, will 'prostitute' their name or title, forgetful, as Kay J. remarked in a recent case, that 'noblesse oblige.' In due time a highly coloured prospectus issues forth (prospectus writing has now, as has been well said, attained the rank of a fine art), skilfully inflaming the imagination with visions of wealth beyond the dreams of avarice, but by hints and glimpses rather than definite statements which might afterwards prove inconvenient. All is not done when the prospectus is issued. Financial agents are paid to underwrite the company. Brokers are sent into the market to buy the shares of the company at a premium. Sellers are of course easily found, but to sell they must first get the shares, and thus an artificial demand is fostered which again reacts upon the market; or shares are reserved or allotted to the promoters in sufficient numbers to enable them to control the market, and dealers find themselves in Stock Exchange slang 'cornered.' The devices of the company financier to 'support the issue' are as infinite as ingenious

> 'Numberless, nameless mysteries.'

Meanwhile the property bought by the promoter or a syndicate for perhaps £5,000, has been sold to a trustee for the company at a slightly enhanced price, say £50,000, or, to make it look less as if the contract was being forced on the company, a contract is prepared for adoption by the company. At the first meeting of the board after incorporation, the contract is taken into con-

sideration and adopted, and the shareholders stand committed to a ruinous bargain. It only remains for the promoters to realize their shares, if they hold any, at a premium, and then leave the sinking ship for another piratical enterprise.

> 'Sufficient wrecks appear each day,
> And yet fresh fools are cast away;
> Ere well the bubbled can turn round,
> Their painted vessel runs aground;
> Or in deep seas it oversets,
> With a fierce hurricane of debts;
> Or helm directors in one trip,
> Freight first embezzled, sink the ship[1].'

Let not, however, disgust at company mongering hurry us into reactionary legislation, neither let us exaggerate as if the machinery of Company Law were some Juggernaut car crushing thousands of innocent traders and investors beneath its wheels. When we talk of injury to trade by the illegitimate competition of bogus companies we must remember that shareholders in a public company are contented with a lower rate of interest than the ordinary producer, whose capital is at his sole and unlimited risk, and can go on longer producing at a lower rate of profit. This may be disagreeable to the ordinary producer, as it is to the capitalist, to have persons clubbing together to compete with him, but it is not in itself illegitimate. Insolvent, rotten, or speculative trading is not confined to companies, as bankruptcy cases show. So again of investors' losses. For every £1 lost in bogus or bubble companies there has been £3 profitably invested in sound undertakings. All companies that fail are not conceived in fraud. Promoters, like patentees, as a rule believe *bona fide* in their chimerical projects, but are oversanguine. Frauds have been almost entirely confined to the initiation of companies. Promoters' plunder often means loss if the public, as happens in one case out of every four, cannot be got to take up the shares. When the bubble bursts the consequences are not nearly so calamitous as they were in the days of unlimited liability, or even ten years back, when £100 and £50 shares, with only perhaps £5 paid up, were much more common than they are now. Shares are now rarely more than £10, and are frequently paid up within a few months of allotment. The investor, if he knows nothing else, knows exactly what amount he is risking. He knows too that he is risking it in a business of which he understands nothing, and which he never means to attend to. He is in a great measure the author of his own wrong by leaving everything to a corrupt directorate. Is the dupe of his own credulity or cupidity to be protected by Act of Parliament against the 'knavish tricks' of company mongers, any more than the man of the world

[1] The Spleen, by Matthew Green (1730).

who stakes his hundreds in a gold mine as he would do at the roulette-table and sees the stake swept away?

Dr. Johnson once cut short a dispute with an argumentative gentleman by saying, 'Sir, I can furnish you with reasons, but I cannot furnish you with an understanding.' Neither can the law give sense to people who have not got any or who cannot profit by experience. This was the opinion of one who possessed in an eminent degree what Sir William Grant called the 'genius of common sense.' 'I do not think,' said Sir G. Jessel, 'that you can make people honest by Act of Parliament, or prevent fools being taken in by Act of Parliament.' If people will embark in rash speculation they must look out for themselves. 'Qui vult decipi decipiatur.' 'Grandmotherly' legislation is mischievous and an anachronism. We may put it aside the more readily because Lord Halsbury expressly disclaims it. Consistently, however, with such disclaimer of paternal or protective legislation, Lord Halsbury thinks you may impose restrictions on the formation of companies which will secure the stability of such as pass the ordeal, and so prevent the machinery of the Companies Act being used for fraud. Such a scheme necessitates provisional registration, and accordingly a system of provisional registration is proposed to be set up by the bill, and with it are combined stringent provisions for disclosure of specified particulars in prospectuses, the publication of balance sheets in a prescribed form, and a statutory share qualification for directors. These are the salient points or principles of the new measure. Microscopic criticism of details would only obscure the real issues.

The first observation on provisional registration is, that it is a return to a complex system of things deliberately abandoned by the Legislature for a simpler one, and *prima facie* a retrogressive step unless the end should justify the means. The end, of course, is to secure the stability or solidarity of the new company; one-fourth of the nominal capital is to be subscribed, one-tenth paid up, the names of the allottees to be stated, one-fifth of the shares applied for to be held by directors[1], and so on. These conditions complied with, complete registration is to be granted, and the company goes forth to the world stamped with the sanction of the Legislature: with what the credulous will doubtless take for a government guarantee. Grandmotherly legislation is bad, but the next worst thing is to let people fancy you are protecting them when you are not, and so lull them into a false security: here at least false, because these conditions of complete registration are quite illusory as a guarantee of solidarity. There is not a bogus company which could not easily

[1] This extraordinary clause was cancelled in Committee without a division.

comply with them. The hollowest £1 share gold-mining company has generally 2*s.* 6*d.* paid up: if not, the money can be borrowed to-day for deposit with the bankers and paid back to-morrow. So far from any difficulty in getting the one-fourth minimum subscribed, the shares are eagerly taken up, or, if not, the vendor can easily arrange for himself or his nominees to take one-third of the purchase money in shares, or more if necessary, for the bill does not follow the Stock Exchange limit, to say nothing of the devices for underwriting companies, or 'placing' shares, known to the professional promoter. A list of allottees' names really tells nothing. So far as these conditions are concerned the company promoter will easily circumvent the wisdom of the Legislature. There is a still stronger objection. In legislating in such matters the law is going beyond its proper sphere. The success of a commercial speculation is not a matter within the domain of the law. The law cannot properly prescribe how much capital is necessary to be subscribed, how much paid up, what a company may borrow, or what items should appear in its balance sheet. For instance, nominal capital is often made large to provide for an increase of trade. Many prosperous companies have gone to allotment on less than one-fourth of their nominal capital subscribed. Often it is cheaper to borrow than call up capital. Legislation for railway and canal companies, or even insurance companies, is no precedent for interference with trading companies. The Legislature invests a railway company with very arbitrary, not to say tyrannical, powers, including the power to take people's land compulsorily. In such a case it is bound to take care that the company has sufficient capital subscribed to pay for the damage it is authorized to do before it starts. Similarly it may well require a guarantee deposit in the case of an insurance company, where the whole public are interested. Nothing but harm can come of dictating to trading companies how they are to carry on their business. Lord Thring justly characterized such legislation as a 'mediæval superstition.'

Take again disclosure in prospectuses, the next salient point of the Bill. Before making new law let us be sure that the existing law is inadequate to deal with the will o' the wisp prospectuses that lure unwary investors into the quagmire of a winding up.

Buying a share in a trading company is not like buying a pound of tea or even a horse or a house. The buyer cannot examine it as he can a chattel and so judge of what is offered him. He is obliged to trust to what the seller chooses to tell him, and the law considering this, considering that in such a case the facts are within the knowledge of the directors or promoters, and not within the knowledge of those to whom the prospectus is addressed, requires, as in

the case of an insurance contract, full disclosure of all material facts, all facts, that is to say, which would be calculated to influence the mind of a reasonable man in applying or not for shares. 'Those who issue a prospectus,' said Vice-Chancellor Kindersley in *New Brunswick Rly. Co.* v. *Muggeridge* (1 Dr. & Sm. 381), 'holding out to the public the great advantage which will accrue to persons who will take shares in a proposed undertaking, and inviting them to take shares on the faith of the representations therein contained, are bound to state everything with strict and scrupulous accuracy, and not only to abstain from stating as fact that which is not so, but to omit no one fact within their knowledge the existence of which might in any degree affect the nature or extent or quality of the privileges and advantages which the prospectus holds out as inducements to take shares.' Lord Chelmsford's language in *Central Rly. Co. of Venezuela* v. *Kisch* (L. R. 2 H. L. 113) is to the same effect: 'Although in its introduction to the public some high colouring and even exaggeration in the description of the advantages which are likely to be enjoyed by the subscribers to an undertaking may be expected, yet no misstatement or concealment of any material facts or circumstances ought to be permitted. In my opinion the public who are invited by a prospectus to join in any new adventure, ought to have the same opportunity of judging of everything which has a material bearing on its true character as the promoters themselves possess. It cannot be too frequently or too strongly impressed upon those who, having projected any undertaking, are desirous of obtaining the co-operation of persons who have no other information on the subject than that which they choose to convey, that the utmost candour and honesty ought to characterize their published statements.' No words could lay down more clearly or emphatically the absolute duty of full and fair disclosure. If this duty is not observed and shares are applied for on the faith of the prospectus, the law, treating the prospectus as the basis of the contract, makes the contract voidable and the allottee is entitled at his option to affirm it or disaffirm it (*Oakes* v. *Turquand*, L. R. 2 H. L. 325): if he elects to disaffirm, rescission carries with it a complete 'restitutio in integrum.' Of course (the contract being valid till rescin ed) the allottee must come promptly and before the rights of creditors have intervened by a winding up. He cannot wait to see whether the company is going to be a success before he elects. It is not necessary, be it observed, that the misrepresentation or concealment should be fraudulent. The promoters or persons who issue the prospectus may even believe *bona fide* that the undisclosed facts are immaterial; such a belief, if the facts are material, will not alter the rights of the allottee. Nor is it necessary that the mis-

representation or concealment should have been the sole inducement to take shares; it is sufficient that it was part of the inducement (*Carling* v. *London & Leeds Bank*, 56 L. J., Ch. 321). Nor again can the promoters be heard to say that the allottee might have found out that the representation was false. The onus is on them to prove that he did find it out and therefore did not rely upon it (*Redgrave* v. *Hurd*, 20 Ch. D. 13).

If the misrepresentation or concealment is fraudulent, the allottee's remedy is not confined to rescission. He may maintain an action for deceit against the persons issuing the prospectus, whether promoter or director. Moral fraud is the foundation of this kind of action, but it is not necessary that the director or promoter should know that what he states is false. If he makes a positive assertion, without having any belief on the subject one way or the other, that is fraud, because he pretends to know what he does not. A partial or fragmentary statement of fact, such as to make that which is stated absolutely false, is equivalent to an active misstatement (*Peek* v. *Gurney*, L. R., 6 H. L. 403). Even if he believes his untrue assertion to be true, still he is liable for fraud if the belief was destitute of all reasonable grounds (*Western Bank of Scotland* v. *Addie*, L. R., 1 H. L. Sc. 162). The recent case of *Peek* v. *Derry* (37 Ch. D. 541) shows that the absence of reasonable grounds is not merely evidence of fraud, but a substantive ground of liability. 'Culpa lata dolo aequiparatur.' Motive does not matter. If directors or promoters 'trick' a person into taking shares they are civilly responsible for a deceit, whatever their motive may be (*Smith* v. *Chadwick*, 9 App. Cas. 201). The measure of damages in such an action is a complete indemnity. It is the difference between the amount paid for the shares and their value immediately after allotment, not necessarily their market value, for that may be fictitious, but their true value ascertained by the light of subsequent events, showing the inherent worthlessness of the company. If vendors have secretly bribed the directors to complete, the company may of course rescind (*New Sombrero Co.* v. *Erlanger*, 5 Ch. Div. 73: 3 App. Cas. 1218), or at its option retain the property and recover the excess (*Emma Mining Co.* v. *Grant*, 11 Ch. D. 918).

This is a brief summary of the law. Sect. 38 of the Companies Act, 1867, really added nothing to it (the late Sir G. Jessel recommended its repeal), nor does sect. 7 of the new Bill. That section requires any party who issues or is party to the issuing of any prospectus 'to see that the prospectus discloses truly all material particulars within his knowledge as to the property acquired or to be acquired, the consideration paid or to be paid for any property so acquired or to be acquired, the mode in which that consideration

or any part thereof has been or is to be applied, and any arrangement by which any promoter of the company, or any person on behalf of or by the aid or connivance of any promoter of the company, derives any benefit or advantage from or out of or conditionally on the payment of any purchase or other money payable out of the company's funds, or from or out of or conditionally on the issue of any shares or debentures of the company.' Passing over the impolicy of substituting the rigid words of an Act of Parliament for the elastic principles of equity, the obvious comment is, if the particulars here specified are material to be known they must be disclosed under the existing law; if they are not material, they are not wanted: so far from adding to the efficacy of the law the section detracts from it on the familiar principle of construction 'expressio unius exclusio alterius.' If certain things are directed to be disclosed, the popular, if not the proper, inference is, that the rest need not be disclosed. Then again the penalty. Non-compliance with this vague and difficult section will expose the person issuing the prospectus, though he may have acted *bona fide* and be guilty of nothing worse than an error of judgment, to any number of actions for compensation, not merely by allottees, but by anyone who has sustained loss. Non-compliance is even made a misdemeanour. Fictitious frauds are objectionable, fictitious crimes are worse. This is setting a trap for honest directors. Already many scrupulous men are deterred from becoming directors by fear of the consequences under sect. 38. Sect. 7 by its increased stringency will only drive away honest men, already too few, from the direction without deterring rogues, and leave company promotion and company direction to men of the worst class. If, in justification of such a burdensome obligation, it is said that the existing law of disclosure, excellent as it is in theory, is not complied with in practice where disclosure is inconvenient, the answer is that neither will the new section be complied with where compliance is inconvenient. It is absurd to suppose that a director or promoter will by confessing a bribe proclaim himself a rogue in the very prospectus in which he is asking people to trust him with their money. He either runs the risk or contracts himself out of the section by a condition that the applicant for shares shall waive disclosure. The Bill makes such a contract void. Probably it is so already, though the point has never been decided.

It is the same with balance sheets. To compel publication is not only unfair to many companies as inviting competition and disclosing trade secrets, it is useless. If the directors are honest men they will issue sound and reliable balance sheets to their shareholders without compulsion, as in nine cases out of ten they do

now; if they are dishonest they can easily evade the requirement. You cannot compel rogues to disclose their delinquencies. They can comply with the form and yet tell nothing. 'If you have rogues to deal with,' said Sir G. Jessel in his evidence before the Select Committee of 1877, 'they will send you in papers perfectly "en règle," as the French say. It is like the thieves in France, always having passports all right; they will give you everything in form looking beautiful.' 'I knew,' says Mr. Newmarch, another witness, 'an assurance company (now defunct) in the City of London which had the most beautiful accounts of any insurance office in the City of London, and it was known to those whom it might concern that every penny of its assets had been lost for years in a silver mine in the south of France.' Auditing carries it no further. Mr. Justice Stirling's decision in *Leeds Estate Building Co.* v. *Shepherd* (36 Ch. D. 802) is a salutary one, that it is the duty of an auditor not to confine himself merely to verifying the arithmetical accuracy of the balance sheet, but to inquire into its substantial accuracy, and ascertain that it contains a true representation of the state of the company's affairs; but how is an auditor to know that debts put down as good are bad, or that stock certified as machinery is merely old iron?

If directors are really dishonest, if there is the intent to defraud, they can be easily reached under the existing criminal law. By 24 & 25 Vict. c. 96, sects. 81–84, any 'director fraudulently appropriating any of the property of the company, or receiving property of the company and making a false entry, or mutilating or falsifying books or accounts, or *circulating or concurring in circulating any written statement or account which he shall know to be false in any material particular, with intent to deceive or defraud any member, shareholder or creditor of the company, or with intent to induce any person to become a shareholder therein,* or to intrust or advance any property to such company or enter into any security for the benefit thereof,' is guilty of a misdemeanour. There is also the offence of fraudulently destroying or falsifying books under sect. 166 of the Companies Act, 1862. Under sect. 167 of the same Act the Court may, in a winding up by the Court or under supervision, direct the prosecution of delinquent directors, and under sect. 168 the liquidator, under a voluntary winding up, may prosecute with the sanction of the Court. The Court's power of discovery is ample. Under the inquisitorial jurisdiction conferred by sect. 115 it may, after a winding up order (at the instance of the liquidator or a contributory), summon before it any officer of the company or person known or suspected to have in his possession any of the estate or effects of the company or supposed to be indebted to the company, or any

person whom the Court may deem capable of giving information concerning the trade dealings, estate or effects of the company, and may require production of books, papers and other documents; if the person summoned refuses to come, he may be apprehended and brought before the Court. Notwithstanding these facilities for the punishment of fraudulent directors, it is significant that there is not a single reported case of prosecution under 24 & 25 Vict. c. 96. Under sects. 167 & 168 of the Companies Act there are only three cases on record, *Eupion Fuel and Gas Co.* (W. N. 1875, 10), in which the order was refused, *Mercantile and Marine Insurance Co.* (May 1882), and *Re Denham & Co.* (53 L. J. Ch. 1113). The reason why directors' undivulged crimes escape unwhipt of justice is not difficult to discover. There has been no one to put the law in motion. The costs of winding up prosecutions (and they are enormous) come out of the assets; the assets are already sufficiently small, the result doubtful. *Fiat justitia ruat cœlum* is by no means the feeling of the already heavily mulcted shareholder. If two-thirds of the shareholders disapprove of criminal proceedings, their wishes prevail (*Re Northern Counties Bank*, 31 W. R. 546). Fraudulent directors know this, and can reckon on impunity. Nearly all the witnesses examined under the Commission of 1877 agreed that nothing would be done until a Public Prosecutor was appointed. We have that functionary now, and there seems no reason why the Court should not refer a bad case to him with a direction to consider the case referred with a view to a prosecution, if he thinks it desirable. The punishment of fraud is a matter of public importance, and should not be left to the caprice of ruined shareholders, not always above suspicion of favouring the escape of the delinquent. Section 15 of the Chancellor's Bill, requiring the liquidator to make a report as to any fraud in the promotion or formation of the company, is one which might usefully be incorporated into the existing law. There is an analogous provision in the Bankruptcy Act, and it has worked well. There were sixty-five prosecutions directed in 1885, ninety-one in 1886.

Promoters are not express trustees within 24 & 25 Vict. c. 96, sect. 1, but they can be reached under the law of conspiracy. Every one commits the misdemeanour of conspiracy who agrees with any other person or persons to do any act with intent to defraud the public or any particular person or class of persons, or to extort from any person any money or goods. Such a conspiracy may be criminal, though the act agreed upon is not in itself a crime. True, it takes two persons to make a conspiracy, but in these cases of company promotion there always are two.

The law indeed as to promoters is quite as adequate as the law

as to directors. 'Promoter' is a word not confined within the 'iron framework of a definition,' not even a term of art, but of the widest signification. A promoter is one who, to use Chief Justice Cockburn's language, 'undertakes to form a company with reference to a given project and to set it going, and who takes the necessary steps to accomplish that purpose.' Strictly, a promoter is not an agent or trustee for the company before incorporation, because the company is non-existent; but, by a convenient fiction of equity, a sort of relation back, the promoter is treated as standing in a fiduciary relation to the company which he creates from the time that he began the business of formation. Any commission he receives from a vendor without the knowledge of his principal the company is in law a bribe: it is a profit which the company has a right to extract from the promoter whenever it comes to its knowledge (*Phosphate Sewage Co.* v. *Hartmont*, 5 Ch. Div. 457). To the 'commercial conscience,' as Lord Justice James called it, this fiduciary relationship is a hard saying, but it is a most powerful curb to wrong-doing by promoters. By one masterly stroke the promoter is transformed into a trustee, and all the resources of equity are arrayed against him. This is one of those doctrines which illustrate what Lord Campbell said of Lord Mansfield's commercial decisions, 'the superiority of judge-made law to the crude enactments of the Legislature.' Nowhere is this superiority more manifest indeed than in company law: in the principles which govern the misfeasance of directors[1], their warranty of authority and power of delegation, in the negotiability of debentures, in floating securities, in *ultra vires* borrowing and the surrogation of the lender, in the difficult and delicate questions arising out of the transfers of shares, complete and inchoate titles, in the payment of the full price of shares, in set off, in the issue of shares at a discount, or the purchase by a company of its own shares: in these and many other instances that might be given judge-made law has vitalized the Acts, and worked out a sound and satisfactory code of commercial law for companies, which chiefly requires now to be consolidated. Legislative 'tinkering' is at all times the bane of English law: it is especially to be deprecated when applied to the carefully-constructed and delicate machinery which regulates trading companies.

A statutory share qualification for directors presents itself as a promising way of securing *bona fides* in the direction by giving the directors a substantial stake in the company's fortunes. The law on the subject of directors' qualifications has hitherto been, as Lord

[1] Note the latest case, *Boston Deep Sea Fishing Co.* v. *Ansell*, 39 Ch. Div. 339.

Justice Lindley remarked in *Re Wheal Buller Consols, Expt. Jobling* (57 L. J., Ch. 333), in a very unsatisfactory state. Generally speaking, a director's taking up his share qualification is not a condition precedent to his appointment, but the articles require a director to qualify himself within a reasonable time. A duty to qualify is not however a contract to take the shares, and cannot be construed as such, and accordingly directors go on acting and attending board meetings without qualifying, and too often escape liability on a winding up. The Legislature might easily obviate this by enacting that the acceptance of the office of director shall operate as an implied contract to take the necessary qualification shares. The policy of a statutory share qualification as a guarantee of *bona fides* is a different and very doubtful expedient. A qualification may be proper as a guarantee of management, but the frauds which a statutory qualification is designed to prevent, occur, it is to be remembered, not in the management, but in the formation of a company. The Chancellor's Bill as amended in Committee fixes it at 20 shares, but this in a company with £1 shares is illusory; in a company with £100 shares it is excessive, especially if they are to be paid up at once as sect. 11 provides. Brains, technical knowledge, business capacity, not money, are a director's best qualification. A high share qualification, if it secured *bona fides*, would secure it at the expense of energy and ability in the direction, but it would not even secure *bona fides*. Dishonest directors would still be presented with whatever share qualification they might require by the vendors or promoters. If they took it themselves they could part with it as soon as the company's prospects became overcast. Moreover it is not desirable that directors should have a voting power which enables them to control the company. There are cases where directors may serve their own interests while sacrificing those of the shareholders (*North-West Transportation Co.* v. *Beatty*, 12 App. Cas. 589).

If there is to be any interference with a company's right to manage its own concerns in the way in which it thinks best, a commercial tribunal is the proper one for the purpose: for companies the fittest, perhaps, is the Committee of the Stock Exchange. Already that body exercises a censorship over new companies. By its rules bargains in the shares of a new company are contingent on the appointment of a special settling day. This settling day the Committee will appoint, but only provided that no allegation of fraud be substantiated, and that there has been no misrepresentation or suppression of material facts. On the application for a settling day the directors must produce the prospectus, the Act of Parliament, the articles of association or a certificate that the com-

pany is constituted upon the cost-book system under the Stannary laws, the original applications for shares, the allotment book signed by the chairman and secretary to the company, and a certificate verified by the statutory declaration of the chairman and the secretary stating the number of shares applied for and unconditionally allotted to the public, the amount of deposits paid thereon, and that such deposits are absolutely free from any lien, the bankers' pass book and a certificate from the bankers stating the amount of deposits received. A quotation may be granted 'provided the company is of a *bona fide* character, that the prospectus has been publicly advertised, that it provides for issue of not less than half of the nominal capital and for the payment of ten per cent. upon the amount subscribed, the arrangements for raising the capital by shares fully or partly paid up, the amount paid or to be paid to concessionaires, owners of property or others on the formation of the company or to contractors for works to be executed, and the number of shares, if any, proposed to be conditionally allotted, that two-thirds of the whole nominal capital proposed to be issued have been applied for and unconditionally allotted to the public (shares reserved or granted in lieu of money payments to concessionaires, owners of property or others not being considered to form part of such public allotment), that the articles restrain the directors from employing the funds of the company in buying its own shares, and that a member of the Stock Exchange is authorized by the company to give full information as to the formation of the undertaking and be able to furnish the Committee with all the particulars they may require.'

Here is a machinery ready to hand, the arbitrament of a recognized commercial tribunal of the highest integrity and impartiality, thoroughly conversant with the matters with which it is dealing, and the protean devices of promoters; a discretionary jurisdiction, too, which can examine each case on its own merits, and is therefore elastic in a way that the jurisdiction of a registrar cannot be. If trade is to be purged of the perilous stuff which weighs upon its heart this censorship might be strengthened by legislation, or more rigorously enforced by the committee itself. Already it is a tacit, not uncommonly an express, condition of membership that the company shall obtain a settlement; why should not this tacit condition be made a statutory condition, so that a refusal by the committee to grant a settling day shall make the contract to take shares voidable at the option of the shareholder, and any contract by the company to buy property conditional on a settling day being granted? This would have the further advantage of checking the objectionable practice of dealing in shares before allotment.

To render the control of the committee more effective, there ought to be someone, an 'advocatus diaboli,' to oppose the settlement and elicit the necessary facts. The Stock Exchange Committee no more than the Legislature can guarantee the success of a commercial undertaking, but it has unique opportunities of detecting and defeating frauds. The Hyderabad scandal was rendered possible because the concessionaires never ventured to apply for a quotation. A conspiracy to obtain a settling day by fraud for the purpose of defrauding the public is an indictable offence (*Reg.* v. *Aspinall*, 1 Q. B. D. 730).

It has been made a cause of quarrel with the Chancellor's Bill, especially by Mr. Chamberlain, that it contains no provisions for transferring the winding up of companies, like bankruptcy, to the Board of Trade. Complaints about winding up must always be discounted. Insolvency, whether of an individual or a company, can never be satisfactory to anybody. If the present system is dilatory and expensive, it is so from difficulties inherent in the business itself. In a winding up there are not only creditors to be dealt with, but contributories with rights *inter se* not easily adjustable. 'Sometimes,' as Sir G. Jessel said, 'the property is wholly unsaleable, unfinished works, drowned out mines, and things of that kind, and great delay takes place in realising them. Then there are bad or doubtful debts which cannot be got in: very often they occasion suits. Debtors run away and you have to find them and compromise with them. That is one source of delay, and the other is the immense mass of litigation with shareholders and creditors: everybody who under any pretence whatever can dispute his liability does so.' A truly Dantean picture! No legislative hocuspocus can get rid of these difficulties. Then there is the vital difference between bankruptcy and winding up, that liquidators are persons known to the Court, accountants of high standing and character; trustees in bankruptcy under the old law were persons of a very shady description. Without admitting, therefore, that the present system has not worked well, bankruptcy is the proper forum if diversities of administration are undesirable. The analogy between winding up and bankruptcy is close, much closer than that between winding up and the administration of estates; the most important rules of bankruptcy administration are now incorporated into the winding up of companies, and the Court of Bankruptcy is presided over by a most able and experienced judge, whose whole time is devoted to solving problems of liquidation. If it is true that winding up occupies one-twelfth part of the time of every judge of the Chancery Division, such a transfer would materially lighten the work of the Division, and perhaps save the appointment

of a new judge. Apart from symmetry of system, the question is mainly one of expense. The present system looks at first sight less expensive: ten per cent. all round is the verdict of an experienced liquidator. In bankruptcy the expense is, according to the latest returns: for estates liquidated by the official receiver about twenty per cent., for estates liquidated by non-official trustees about twenty-five per cent. These estimates, however, afford no certain test. Liquidators have to deal with thousands where bankruptcy trustees deal with hundreds. Relatively ten per cent. may not be a large sum, absolutely it may be a very large sum indeed. Statistics here are wanting[1]. The transfer would not involve any great changes. Windings up by the Court would be conducted by the official receiver, windings up under supervision (the best and cheapest mode of company liquidation, because it gives the liquidator a free hand), by non-official liquidators or trustees under the control of the Board of Trade, voluntary windings up, except for purposes of reconstruction, would cease. The defect of the present Bankruptcy Act is that it is evaded. The soul of the private trader abhors bankruptcy, because publicity makes starting again difficult. His solicitor seconds his antipathy, because he prefers £100 fee for seeing the debtor through an arrangement to the few pounds to be got out of a bankruptcy petition. The result is that half the insolvent estates are liquidated outside the Act. This would not be the case with companies. A company does not start again after a winding up, and would not have the motive which a private trader has for keeping out of the Act; if it had, a private arrangement would be impossible to a company.

But, after all, it must be remembered the chief evils of company trading come from a cause inherent in our joint stock system, a cause which no legislation can cure, namely, management by deputy. Hence come frauds in the initiation of companies and mismanagement in the conduct of companies' business. Even when directors are not ignorant or dishonest or mere 'guinea pigs' as they are called, they take up the direction of a company, perhaps of half-a-dozen, as a mere *πάρεργον* or bye-business, in a spirit entirely different to that of the individual trader, and therefore with the individual trader the joint stock company can never successfully compete. The continental system of partnership *en commandite* is free from this vice and greatly superior. There the shareholders in effect lend their money to an individual trader, the *gérant*. The *gérant* alone is permitted to manage the business, and his liability is unlimited, while that of the shareholders or lenders is limited. This

[1] A return of companies wound up during 1887 will shortly be laid before Parliament.

system secures efficiency of management with the advantage of co-operative capital. The Limited Partnerships Bill, should it become law, will introduce this system into England. The private firm companies, now so numerous, are an approximation towards it.

Whether the present joint stock system is destined to endure or not, the remedy may be worse than the disease, if, in our zeal to check fraud, we hamper trade by mischievous restrictions. The existing law, properly used, is adequate to punish misrepresentation and fraud, and to protect people of 'average rightmindedness.' For those who do not come within this description, we must trust to the lessons of experience to make them wiser.

> 'Experience joined with common sense
> To mortals is a providence.'

It is a providence which the law cannot be and was never meant to be.

ὁ νόμος ἐστὶ καλὸς ἐαν τις αὐτῷ νομίμως χρῆται.

EDWARD MANSON.

[By sects. 4 to 8 of the Companies Act, 1867, it was made possible to form companies with limited liability for the shareholders and unlimited for the directors or managing director. This would answer in a general way to the *société en commandite* having a share capital (Code de Commerce, 38). I have never heard of these provisions being acted upon in England. ἐὰν δέ τις αὐτῷ μὴ χρῆται is an alternative too often overlooked by the well-meaning permissive legislator.—ED.]

REVIEWS AND NOTICES.

[**Short notices do not necessarily exclude fuller review hereafter.**]

The Whewell Lectures. International Law. A series of Lectures delivered before the University of Cambridge, 1887. By HENRY SUMNER MAINE, K.C.S.I. London: John Murray. 1888. 8vo. 234 pp.

THIS last work of the vanished hand of a great master, though not what it would have been, either in substance or in style, had the author lived to bestow upon it that perfection of finish which characterises his other writings, is of permanent interest and value. Of the twelve lectures contained in the volume, the first four deal with the general conception of International Law, while all the others are devoted to the consideration of various aspects of the law of War. This is quite in accordance with the wish of Dr. Whewell that the occupant of the chair which he founded should 'make it his aim, in all parts of his treatment of the subject, to lay down such rules, and suggest such means, as may tend to diminish the evils of war, and finally to extinguish war between nations.' Sir Henry Maine was, however, by no means over-sanguine of the success of any 'mere literary agency' in bringing about so desirable a consummation, and has some striking remarks upon the collapse of the optimistic views of human progress which culminated at the time of the Exhibition of 1851, and upon the gigantic 'forces which make for war' at the present day. He dwells at length upon the defects of Arbitration as a remedy for the evil, and seems disposed to look with greater hopefulness to such alliances as those of the three Emperors, or of Germany, Austria and Italy, for the effectual preservation of the peace of Europe. The authority of modern continental writers upon the law of Nations he thinks much impaired by official connection with their respective governments. To the older writers, especially to Grotius and Vattel, he ascribes a real and far-reaching influence, while admitting that the foundations by which their system was originally supported have failed to withstand the assaults of modern criticism. It is by no means easy to apportion the credit for the improved tone of International morality among the various causes to which it is due. We may concede that the teaching of the early jurists resulted in 'an instant decay of the worst atrocities of war,' but may hesitate to follow Sir H. Maine in attributing to their exposition of the theory of Sovereignty the acceptance of the view, if indeed it can be said to be accepted, that each state may not only change its constitution or modify its tarifs, but also fortify its frontiers, or annex unoccupied territory, without regard to the susceptibilities of its neighbours.

The object which Sir Henry Maine proposed to himself in his first, and unfortunately also last, course of lectures on International Law, was evidently not to discuss exhaustively any portion of his subject, but rather to glance over the whole of it, pointing out what struck him as its salient features. 'I merely,' he says, 'note points of interest and difficulty as I proceed.' On the much-debated question of the true character of the science, he gives no uncertain sound; maintaining that International has but slender connection with Positive law. 'It has less analogy to the laws

which are the commands of sovereigns than to rules of conduct, which, whatever be their origin, are to a very great extent enforced by the disapprobation which attends their neglect.' He recurs, again and again, to the interesting question as to the mode in which such rules of conduct for Nations have secured acceptance. His answer to this question is, in effect, that the founders of International Law, though they did not create a sanction, created a law-abiding sentiment. 'They diffused among sovereigns, and the literate classes in communities, a strong repugnance to the neglect or breach of certain rules;' just as in the East, even at the present day, 'systems of religion and morals, generally drawing with them some system of laws, gain currency by their own moral influence.' Sir H. Maine seems to think that the 'Franconia case' disclosed a dissent on the part of the English judges from the view entertained in the United States as to the nature and authority of International Law. There is however no reason to doubt that in this country, as in America, its rules are looked upon 'as a main part of the conditions on which a State is originally received into the family of civilised nations.' Here, as there, 'the law of Nations makes an integral part of the law of the land.' The questions really raised in the Franconia case were: first, Does International Law concede to each country a right of controlling for certain purposes the waters within three miles from low-water mark on its coasts? and, secondly, Has English law provided any judicial machinery for exercising the right?

When the late Mr. Bernard, shortly after the Crimean war, advocated the exemption from capture of the private property of enemies at sea, he found few Englishmen to agree with him. But the doctrine of all recent continental jurists and of the 'Marcy Amendment' has made great progress, and now counts many supporters, including Mr. W. E. Hall, even in this country. Sir H. Maine is decidedly in favour of the proposed change, giving weighty reasons for thinking it to be in accordance with British interests. It is not impossible that this conversion of English opinion may come too late. Signs are not wanting that other nations are becoming disinclined to give up a right by which they think they could distress our world-wide commerce and intercept our supplies of food.

The author's remarks, whether he is dealing with questions of speculative theory, of the history of opinion, or of practical expediency, and whether one agrees with them or not, are always interesting and often characteristically felicitous in expression. Special attention may be called to his comparison of the spread of the doctrines of Grotius to the reception of Roman law; to the analogy which he points out between the functions of the 'Ius naturae' and some questionable reasonings in the Year Books; to his parallel between the 'Dreikaiserbund' and the Amphictyonies. Note also the sayings that the earliest development of Maritime Law consisted in a movement from *mare liberum* to *mare clausum*; that England is, like an insurance company, an unpopular litigant; that the investment of surplus capital in foreign Government securities was rendered possible by the report of the English law officers in the case of the Silesian loan. Sir Henry Maine was not a specialist in International Law, but he was something better. At once a statesman and a philosopher, he saw the science in a truer perspective than is easily attainable to those who are engrossed in its details. His originality and 'detachment' are peculiarly refreshing in a department of thought the writers on which are especially prone not only to succeed but also to resemble one another.

The following *Errata*, which have escaped the vigilance of the learned editors, should be corrected in the next edition: p. 52, for 'natural' *read*

'national;' p. 82, for 'Rhine' *read* 'river;' pp. 101 and 103, for 1854 *read* 1856. The British Manual of Military Law, mentioned in the seventh Lecture, is published and easily procurable. It was out of print when the Lectures were delivered. T. E. HOLLAND.

Études sur l'histoire du droit. Par Sir HENRY SUMNER MAINE. Traduit de l'anglais avec autorisation de l'auteur. Paris: Ernest Thorin. 1889. La. 8vo. lxxviii and 704 pp.

THIS is a translation of the principal contents of the last edition of 'Village Communities,' together with the chapter on India contributed by Sir Henry Maine to 'The Reign of Queen Victoria,' and another essay which ought to be specially noted by English readers and bibliographers. In January 1886 an article on 'The Patriarchal Theory' appeared in the *Quarterly Review*. It defended Sir H. Maine's position against the attack of the McLennan brothers, but spoke of him in terms of cold and reserved civility which probably suggested to many readers, what was known to some to be the fact, that the Reviewer was no other than Maine himself. The authorship was not acknowledged in his lifetime. But here it is declared—and, we have reason to believe, declared with all proper authority—by a translation of the review being included in the volume. The translator (whose name is not disclosed) has made Sir Henry Maine speak in the first person and drop the awkward pretence of treating himself with due but no more than due respect; in short, he has removed the constraint imposed on Sir H. Maine, writing in the *Quarterly*, by the fixed rule of not admitting signed articles. There can be no doubt that this is a literary improvement. The translator's notes, here and elsewhere, are by no means to be neglected, and in the preface he gives his own view of the controversy, in our opinion a judicious one, besides information and remarks of a more general kind on Sir Henry Maine's work. He has also translated, by way of appendix to the preface, the paper by Sir Alfred Lyall which appeared in this REVIEW last April.

We do not profess to have examined the translation with any care, but all the indications are in favour of its being competent and accurate.

The Great Roll of the Pipe for the Twelfth Year of the Reign of King Henry the Second. Publications of the Pipe Roll Society. Volume IX. London. 1888.

THE Pipe Roll Society is carrying on energetically its meritorious work. Its material is not likely to be used much for the sake of general information, and may seem rather barren even to such students of special subjects as would revert to it occasionally in order to clear up some particular points. It requires continuous and painstaking study, and in this case will certainly yield important results. Even quite apart from supplying links for the purposes of general history, local history and genealogy, the entries on the Pipe Rolls are of great use for the study of legal antiquities. In fact, the work of the Society when it is completed will go far to fill up the great and disappointing gap between Domesday and the judicial and manorial records of the thirteenth century. Madox's admirable book, which is to a large extent based on the Pipe Rolls, may give an idea of what can be achieved in this line, and it is only to be wished that his other source of information, the Rolls of Exchequer Memoranda, which though later are

so very full of interest, may be taken up for publication with something of the energy that has been bestowed on the Pipe Rolls[1].

The last volume published by the Pipe Roll Society is devoted to the twelfth regnal year of Henry II (1165–1166), and presents many interesting features. Bishop Stubbs points out in a short and weighty Introduction that the year was one of exceptional importance for several reasons. 'It is the year of the Assize of Clarendon, the edict by which the king made his first and memorable attempt to set the criminal jurisdiction of the Crown upon a popular basis and, at the same time, to apply the proceeds of such jurisdiction directly to the improvement of revenue.' The Pipe Roll testifies in many ways to the influence of this measure. As compared with previous Rolls it has entries on almost every page which are connected with the Clarendon legislation. Almost all the sheriffs are engaged in building gaols; Earl Geoffrey de Mandeville and Richard de Lucy go about and try persons put into prison in consequence of the presentment of criminal juries. The chattels of those who fled or 'perished' in consequence of the ordeal of water get confiscated, and it is to be noticed that, whereas earlier Rolls hardly mention the 'catalla fugitivorum,' this item gets suddenly important in the one under discussion. As for the ordeal, it does not seem to have been at all an easy one to go through. Of course it was not meant to be, as the presentment of the jury established a sort of presumption against the person who had to resort to it, but the indirect testimony to its great risk ought to be noticed in view of the opposite inference suggested by some of the Corona Rolls of later date[2]. The tithings of the Frankpledge appear busy at work finding or standing pledge for accused persons, and paying fines for them when they fled. The tithings are mostly designated by the name of the fugitive culprit or that of the tythingman[3] (decennarius; capitales plegii), but in Sussex they are mostly taken as local (92), according to the tendency of bringing this personal system together with the distribution in villages.

The Roll is especially rich in allusions to legal organization and legal practice, even apart from the direct influence exercised on it by the Assize of Clarendon. Gerold Canon in Yorkshire pays fifty marks for being allowed to remain in seisin of certain lands till judgment is given about them (p. 41). A similar fine is paid by Roger of Arundell in Sussex[4] (90; cf. viii. 92). The procedure of novel disseisin has left several traces in the Roll[5], and we catch a glimpse of the difficulties which stood in the way of working the Great Assize by the entry of an amercement on men who had refused to act as jurors[6]. As to duel, an interesting case occurs in Yorkshire, where Mauger the Clerk and his whole Court Baron are amerced for letting the same man fight two duels in one day (46, 47). One rather obscure entry seems to allude to a misunderstanding as to the part which

[1] They begin with the first years of Henry III's reign. They have been strangely put aside in the Series of the Record Commission, and to my knowledge the only portion ever edited are a few extracts from the Rolls of Edward I. preceding Maynard's edition of the Year Book of Edward II (1678). They are mostly in beautiful preservation, and extant in two copies as the Rolls of the Queen's Remembrancer and of the Lord Treasurer's Remembrancer.

[2] Maitland, Select Pleas of the Crown, edited for the Selden Society, vol. i. p. 75.

[3] p. 31: 'Radulfus Lunel et tidinga ejus deb. 1 m.' Cf. 15, 87.

[4] In one instance saisina is used where later documents would have spoken of feodum: 'quia arauerunt terram Regis super saisinam Regis' (65).

[5] p. 7: '40s. pro dissaisina super breve Regis;' cf. 10.—p. 98: 'Aluredus de Muntsorel reddit compotum de 10 libris quia dissaisivit puellam de terra sua injuste.' Cf. 4.

[6] p. 65: 'Homines de T. debent 5 marcas quia noluerunt jurare Assisam Regis.' Cf. the entry as to Thomas de Lufham on the same page.

the procedure of appeal had to play in connexion with the presentment system newly brought in by the Clarendon Assize[1].

In some other respects our Roll is, of course, not so explicit as earlier documents of the same class. On the question of personal condition, for instance, it gives very little, and in fact the negative observation is not without its meaning, that not one of the later Rolls is at all to be compared in this respect with the earliest extant—31 Henry I. One fact to which our Roll testifies in this connexion is the absorption of free socmen holding immediately from the king by feudal lordships. The socmen of Earl Conan in Lincolnshire are still paying their tallage to the king directly (p. 3); but, on the other hand, twenty-four shillings of the revenue from the socmen of the Hundred of Ho, in Suffolk, have been given away for some time past to a certain Richard (Vetule?—p. 17), and the socmen of Stoke and Wilbarston, in Northamptonshire, have to pay forty shillings to William of Albiny (63). These last are particularly interesting. In the Domesday Survey the ancestor of the Albinys, Robert of Todeny, holds three hides in Stoke and three hides and one virgate in Wilbarston (Dd. i. 225), and close to his land we find in both places socmen holding of the king (five in Stoke with one hide between them, and five in Wilbarston with three virgates between them, Dd. i. 220 a). The Pipe Rolls show ever since 1155 that the Albiny manor was exercising a kind of attraction on these people (2 Hen. II. 41; 3 John, 74). That they are not entirely given away from the king's hand is shown[2] by the regularly recurring entry of their forty shillings on the Pipe Rolls.

Another passage worth notice is the one mentioning the amercement of the soke of Alverton in Yorkshire. The suitors of the soke have to pay ten marks for putting a man to the ordeal of water without a serjeant of the king (49). It is probable that they had acted in such an independent manner from a sense of their power as a collegiate Court to administer justice in what way they pleased. Instances of similar deviations from the right course are frequent enough in later documents.

The Bishop of Oxford draws attention in his Introduction to the hutch which the Sheriff of Wiltshire had to provide for the letters of the barons; a fact probably connected with the return as to the number of knights' fees included in their fiefs. The Lincolnshire accounts give a more direct indication as to the same business: 'Alanus de Munbi debet 40 solidos quia non interfuit iurate feodorum Militum' (p. 8).

I need hardly say that the Roll contains a good many entries as to guilds and other municipal institutions. Altogether it would be quite impossible to exhaust in a brief survey the topics of interest presented by this document. The editors seem to have done their work with their usual care. A note or two on points of interest or obscurity as they come up would not be amiss, I think; especially as the Glossary given in the Introduction (vol. iii) is more likely to produce mischief than to be useful[3].

[1] p. 57: 'Serlo de Turlanestone debet 10 m. ut habeat diracionacionem suam si appellatus fuit ab aliquo de morte cujusdam unde retatus est.'

[2] Comp. Bridge, Northamptonshire, ii. 338. Wilbarston is printed Wilberdestoche in the ninth volume, and in several others; but 2 Henry II has Wilber d estune, which is of course the right spelling.

[3] I will just point out as an instance the explanation of *coterellus* as a servile tenant holding in mere villeinage (iii. 78). This may be true or wrong as to the well-known *cottier*, who is sometimes called *coterellus* in Domesday and in manorial extents. (In fact it is wrong.) But in the Pipe Rolls, *coterellus*, a current term, always means a hired soldier; i. e. i. 62; ii. 26; v. 15; viii. 31, 102, 110; ix. 131. Madox, Exch. i. 136. Comp. Radulfus de Diceto, ii. 167, and *Ducange*, v. *Cotarellus* and *Coterellus*.

There can be no doubt, however, that the work as a whole is very well done, and of an importance which it would not be easy to exaggerate for all students of English medieval history. P. V.

Year Books of the Reign of King Edward the Third. Year XIV. Edited and translated by Luke Owen Pike. Rolls Series. 1888. La. 8vo. lxxvii and 377 pp.

Every volume that Mr. Pike publishes shows more clearly than the last that the work of editing those Year Books of Edward the Third's reign, which owing to what we may now call a happy accident were not included in the old editions, is in good hands, is in the very best hands. On every page he shows himself an excellent editor and an excellent translator, and his use of the plea rolls as a supplement for the reports is beyond praise. Only one general criticism occurs to us, and that concerns neither his French text nor his English version, nor again his foot-notes, which are all that foot-notes should be, but his introduction. He gives us some sixty pages of introduction, and though there is much in those pages which is interesting, still we cannot help thinking that this considerable space might have been better used. We are not quite certain how much liberty is allowed the editor by the regulations under which he works, and therefore the criticism which will here be passed is subject to correction. As is well known, the original scheme of the Rolls Series, formulated in a document printed at the beginning of every volume, has long ago been neglected, or at all events subjected to an extremely liberal interpretation. This is not to be regretted, for if an adherence to the programme would have defended us against some very poor and very cheap stuff, it would also have deprived us of some of the best historical essays ever written. Now Mr. Pike devotes his sixty pages to a number of disconnected themes which are suggested by some of the cases reported in his text. What he has to say about these various themes is always sensible and often valuable; but the total result is of necessity a series of notes which can produce but little effect on the study of law or history. The discussions seem either too short or else too long; too long to be mere explications of any difficulties in the text, too short to get to the bottom of any piece of legal history. For instance, in one of the reported cases a distress is said to have been made on a Sunday; in another case a Prior executes a deed on Sunday; thereupon Mr. Pike devotes two pages of his introduction to the observance of Sunday. Well, the history of the observance of Sunday in the middle ages is an interesting history, and very little known to the generality of Englishmen, who are apt to assume that the British Sabbath is a very ancient institution. But Mr. Pike's treatment of the subject is very brief indeed, and he passes on to make notes about a curious mistake as to the days of the week, a particularly execrable specimen of false Latin, the social condition of the 'bondes,' the sale of growing timber and so forth. Now such an introduction, however learned, is somewhat ineffective. If he would take up some one subject in each introduction, some one doctrine of law which was coming to the front in the time with which he is dealing, and work it out, then we should remember for ever what was in every introduction. There is no one who has studied the reigns of Henry II and Richard I but knows what the introduction to each volume of Hoveden or of Benedict is about; but will it be remembered that in this book Mr. Pike has a page on 'bondes and bondage,' two pages on the deposition of Edward II, and two on feoffments of rents? We mention this last topic because in breaking off

some provokingly brief remarks about it, Mr. Pike held out a hope that he would on some future occasion treat more comprehensively 'the feoffment and livery of incorporeal hereditaments.' Since the hope thus held out is fulfilled in the pages of this REVIEW, it is certainly not for us to complain, and indeed there is no ground for anything that can be called complaint; only we could wish that Mr. Pike saw his way to making each introduction an essay on some one topic. He seems to hint that 'the duty of the Editor' is an obstacle. If it be so, we are sorry for it. But is it so? Heretofore 'the duty of the Editor' has been very differently understood by different editors, and granted that the space can be obtained (a great deal may be said in sixty pages), surely the best interpretation is that of those who have believed that duty did not debar them from making permanent contributions to English history. Mr. Pike is so learned and writes so well, and the number of those who know anything of the Year Books and the Plea Rolls is so small, that we hope that he will reconsider his notion of duty, and make his next introduction less miscellaneous.

About a few points of no very great importance we cannot at present agree with him. His 'proof that the Liber Rubeus of the Exchequer, as known to Sir Edward Coke, and as known at the present day, is not the Liber Rubeus which was so called in the reign of Edward III' (p. xxi) has not convinced us. It depends on the interpretation of a record which, as Mr. Pike holds, declares that a copy of itself has been made in the Red Book, but which means as we think only that in that book are divers matters concerning the privileges of the Barons of the Exchequer. However, Mr. Walford Selby, when he publishes the Red Book, will have to consider of this matter. It is difficult to traverse a sentence which states that 'a man of ordinary prudence would not rely too much' on the Dialogus (p. xxvii), for the man of ordinary prudence will not rely too much on anything; still our reliance on that book as on a book written in Henry II's day by one very familiar with the practice of the Exchequer is not shaken by what Mr. Pike says here or in his excellent History of Crime. The only mistakes or discrepancies that he has discovered are mistakes or discrepancies in numerals, and while a man of ordinary prudence will not place much trust in the numerals contained in any medieval book, there may be, and in this case there seem to be, reasons enough why his doubts should go no further. Lastly, when it is said that of a clerk who has appeared in court 'venit per coercionem Episcopi Lincolniensis,' surely this is not 'a curious instance of episcopal interference' (pp. lviii, 112); all that is meant is that the bishop had been ordered to produce one of his clergy; this was the ordinary way of compelling a clerk who had no lay property to appear and plead, at least it was so in the thirteenth century.

F. W. M.

The Anglo-Indian Codes. Edited by WHITLEY STOKES. Vol. II. Adjective Law. Oxford: Clarendon Press. 1888. 8vo. 1224 pp.

MR. WHITLEY STOKES has completed his monumental edition of the Anglo-Indian Codes by the publication of the volume of 'Adjective Law.' This volume consists mainly of three very important Acts, the Code of Criminal Procedure, the Code of Civil Procedure, and the Evidence Act. In the Introduction to the Code of Criminal Procedure Mr. Stokes gives an interesting history of the Acts which it superseded, and incidentally defends himself against a suggestion that the repeal of Sir James Stephen's Code of 1872 was unnecessary and inexpedient. The strongest part of his case is based

not so much on the importance of the amendments effected by the Act of 1882, as on the expediency of amalgamating into one Code three separate Acts or sets of Acts dealing with the same subject-matter and applying respectively to the Criminal Courts in the country, to the Chartered High Courts, and to the Magistrates' Courts in the Presidency Towns. And he is fully entitled to use, as a personal argument, a *dictum* to which Sir James Stephen once committed himself, that the process of repeal and re-enactment ought to be repeated at least once in every five years for every important Act. Whether the author of this *dictum* would still adhere to it is another question. It is, no doubt, of great importance that the process of revision should be continuously applied to the Codes for the purpose of removing ambiguities and supplying defects disclosed by their working. But it is also of great importance that this process should be applied in such a manner as involves the minimum of inconvenience to practitioners and the public, and not to encourage the notion that it is the function of each Indian legislator to devour the offspring of his predecessors. When amendments do not involve any structural alterations of the 'principal Act' (to use a term employed by the English Legislature), it is not necessary to repeal the principal Act, and the object in view may be equally well attained by making the amendments in such a form that they can be printed into that Act, and then by issuing an authoritative edition of the Act, with the amendments incorporated. This was the course adopted in the case of several important amendments effected in the Civil Procedure Code of 1882 by a Bill which was introduced by the late and passed by the present Law Member, and which unfortunately did not reach England in time to be incorporated, otherwise than as an appendix, in the present volume. In this case the Government of India did not think it necessary to repeal formally the Code of 1882, but contented themselves with bringing out, through the agency of the Legislative Department, a new edition of that Code with the amendments printed in their proper place. This is the course adopted in England with reference to the annual amendments of the Army Act, and attempts have recently been made to apply it in other cases, as by the Friendly Societies Act of 1887, and the Patents Bill of 1888. The experiment is worth watching, because it may indicate a method of improving the clumsy way in which English Acts are at present too often amended.

Some of the amendments made by the Criminal Procedure Code of 1887 raise questions of present interest to the English legislation. One of them took away from Appellate Courts the power which they had previously possessed of enhancing sentences on appeals presented by accused persons. This was done on the ground that, to use Mr. Whitley Stokes' words, 'the existence of such a power tended to deter convicted but, possibly, innocent persons from presenting appeals, and thus to deprive the lower courts of the control which could only be effectively exercised over them by means of an unhampered system of appeals.' Mr. Stokes has however omitted to notice that the power of enhancement can still be exercised by the High Courts (though not by any other Courts) as Courts of revision under sec. 439 of the Code. It is worth observing that the power to enhance sentences was and is given in express terms by the Indian Legislature, and was not left to be inferred from a power to vary.

Another amendment made in 1882 related to the examination of accused persons. Under the previous Code the Court might at any stage of inquiry or trial, without previously warning the accused, put such questions to him as the Court might consider necessary. The Indian Legislature in 1882 thought that this law gave too great latitude to the Courts, and, in affirm-

ance of previous rulings of the Calcutta and Madras High Courts, prefixed to the section giving the power (sec. 342 of the present Code) the limiting words, 'For the purpose of enabling the accused to explain any circumstances appearing in the evidence against him.' The provisions on this subject of the Indian Code of Criminal Procedure and of the Indian Evidence Act are well worth comparing with those of the Bill recently introduced on the same subject by the Attorney-General.

Mr. Stokes' Introduction to the Evidence Act is a model of acute and industrious criticism, and his summary of the differences between the English and the Indian law of Evidence is specially instructive.

The Anglo-Indian Codes have been much talked about but are little known in this country, and not many years ago it was, as the present writer can testify, a matter of considerable difficulty to obtain copies of them in England. Mr. Stokes' edition supplies a want which has been greatly felt, and his introductions and notes contain a store of learning which no one but himself could have brought together. His two volumes ought to be in the hands of every Indian civilian and barrister.

C. P. I.

A Treatise on the Law of Negligence. By THOMAS G. SHEARMAN and AMASA A. REDFIELD. Fourth Edition. In two vols. New York: Baker, Voorhis & Co. 1888. 8vo. cxxi and 1289 pp.

IT is matter of regret that in writing of text-books the legitimate boundaries of subjects are so little regarded. It is tempting without doubt, where an author has an eye to business, to spread the net as wide as possible, but that which is a speculative source of profit to the writer is a clear loss to legal science. Here, for example, is a work of nearly 1300 octavo pages on the law of negligence, with citations of about 10,000 cases. Of all this how much can be really concerned with the doctrine of negligence? A tenth, nay, perhaps a twentieth part of those authorities would probably far exceed the number in which there is any valuable discussion of the subject.

It must be admitted that the statement of the law of negligence presents some difficulty. Once having set forth the general principles, what more shall be said? what further elaboration does the subject require? The question may be answered in at least two ways. The law of negligence is of almost universal application. It is concerned with well-nigh every department of life public and private, and with persons of almost every description and class. We may therefore proceed by classifying the subject-matters to which this head of law has been applied, and illustrate it in its relation to each in turn. On the other hand, the duty of which negligence is the breach—the duty to take care—itself presents a variety which invites classification. The duty may be to take ordinary care, or to take great care, or it may be to take only slight care. You may therefore, if you choose, proceed to range the cases in accordance with this division. This mode of arrangement has certainly a better title to be considered scientific than the other, but in the last resort is based in like manner on considerations of fact, since the ultimate test of the degree of care enjoined is that which reasonable men would require. And it must be always borne in mind that the application of rules of law to facts which are matters of degree, except in plain cases, tends to lack scientific exactitude, and so is apt to become uncertain and thereby in a sense arbitrary. And this mode of classifying negligence is certainly not free from that difficulty: it is by

no means easy to fit all your cases to this triple scale. Perhaps, however, when this latter method is combined with the other, and the degrees of care are illustrated by leading cases drawn from the various classes of subjects to which the law is applicable (as carriers, landowners, etc.), it may be said that you have attained as good and useful an arrangement as the matter is capable of[1].

The authors of the present work have preferred to follow the former method. In their fourth edition of 1880 (to a further issue of which the present work appears to belong) the subject is divided into eight parts, of which the first and last, amounting to 272 pages, are devoted to general principles, and the intervening six (amounting to 958 pages) to special applications of the law to particular classes of cases. The first and last parts comprise the discussion of negligence in general, proximate cause, degrees of negligence, questions of fact and law, evidence, contributory negligence, parties, the effect of death, and the measure of damages. The six intervening parts treat of the application of the law of negligence respectively to (1) liabilities of masters and servants to each other and to third persons; (2) corporations, officers, and trustees possessing a public character; (3) public ways, including canals, bridges and railroads; (4) carriers of passengers, and telegraphs; (5) personal services of lawyers and law officers, notaries, bankers, bill collectors, clerks and other recording officers, and medical men; (6) management of property, namely land and the structures erected on it, machines, factories, etc., also of animals, horses, cattle, etc., and liability for fire.

When a work is so expansive, it is perhaps too much to expect at the same time a very fine scientific quality. In regard moreover to American text-books in general, one is tempted to ask whether the remarkable literary quality of the work of such pioneers as Kent and Story may not have proved at times a somewhat dangerous example to their successors; and furthermore to conjecture whether this may not perhaps be connected with a greater disposition in the American Courts than exists in our own to treat as authorities those who by clothing their learning in an attractive style of legal rhetoric have won their way into general professional favour. Whatever may be the cause, it certainly seems to us that the popular American law-books possess on the whole a decidedly higher standard of literary excellence than our own, which are apt to be dry and sometimes crabbed. At the same time we are fain to think that for scientific precision and contribution to legal theory they are seldom equal to the best books produced by our own writers.

The book before us is an example of this. It is remarkable for the easy, vigorous, correct English in which it is written, none the less attractive for being printed in excellent type. It is, moreover, provided with ample notes, which are junior partners so to speak with the text, taking the burden of illustrating it and supplementing it with minuter criticism of cases. And it is a real advantage in a practical work to have just so much of the subject-matter of the cases indicated as to enable you generally to decide at once whether it is useless for your purpose, or worth exploring farther.

On the other hand, in the discussion of the difficulties which lie at the root of the matter we hardly gain new light from the book. Take for instance the authors' definition of contributory negligence (p. 82): 'One who through the mere negligence of another suffers an injury, to the bringing about of which the want of ordinary care or the wilful wrong of himself or

[1] For this method of arrangement see Mr. Horace Smith's 'Treatise on the Law of Negligence.'

of any person for whose act or neglect in that matter he was responsible so far proximately contributed as that, but for such concurring and co-operating fault, the injury would not have happened, cannot recover in any court (other than in Admiralty) any compensation for such injury unless the more proximate cause thereof is the omission of the other party after having notice of the danger to which the contributory fault of the former party has exposed him to use a proper degree of care for the purpose of avoiding the injury.' The very complexity of such a definition as this suggests that it can hardly be a final analysis, and it is on the face of it too cumbrous to be easily used as a practical canon. It has always seemed to us that hardly sufficient attention has been paid herein to the distinction between cases where the negligent acts are *simultaneous* and those where they are *successive*. In regard to the former class (such as *Dublin, Wicklow and Wexford Railway Co.* v. *Slattery*, 3 App. Ca. 1155, or the case of two persons colliding at a street corner) the rule is, that *if the plaintiff could by the exercise of ordinary care have avoided the accident he cannot recover*. And if both parties happen to be injured, the rule applies equally to each in turn. In regard to the latter class of cases (such as *Davies* v. *Mann*, 12 M. & W. 546, and *Radley* v. *L. & N. W. Railway Co.*, 1 App. Ca. 754) the rule may be stated thus: that *he who last has an opportunity of avoiding the accident, notwithstanding the negligence of the other, is solely responsible*. And the ground of both rules is the same: that the law looks to the *proximate cause*, or, in other words, will not measure out responsibility in halves or other fractions, but holds that person liable who was *in the main* the cause of the injury. This may or may not be a final analysis of this matter; but it is difficult at any rate to believe that the law is not capable of far simpler statement than that which we have cited; and it is disappointing in a work which is the result of so much labour and learning to find so little assistance on one of the most important problems of the subject.

De la Propriété Consolidée, ou Tableau historique et critique de tous les systèmes les plus propres à la sauvegarde de la propriété foncière et de ses démembrements. Par Emile Worms. Paris. 1888.

This work consists of 440 quarto pages, of which the first forty-six are occupied with a historical and critical exposition of the French system of land transfer: the next fifty-three pages are devoted to our old acquaintance, the Torrens system—with a hurried glance at the Irish Landed Estates Court and the legislation of Lord Westbury and Lord Cairns, and a somewhat detailed account of land law in the French colonies of Algiers and Tunis, where the Australian system is making much progress. The German Land Registers—most notably the Prussian—are marshalled before the reader in 100 pages more: another 100 pages are given to a scheme at this moment under discussion in the legislature of the Grand Duchy of Luxembourg, having special points of interest for the French student. The remainder of the book consists of a general review of the whole mass of materials before collected.

This wide and deep survey is, however, absolutely subordinated at every point to the ruling motive of the author's inquiry, which is, in brief:—What amount of certainty can a person have when he buys an estate or lends money on mortgage that his purchase or his security are unassailable in point of title? by what mechanism is such certainty best obtainable, and at what cost in money and time?

It is gratifying to our 'Imperial,' if not national, vanity to learn that the writer (though steadfastly bent upon giving every system its due, and rather to submit facts to the reader than to advocate his own theories) is plainly convinced of an incontestable superiority over all rivals inherent in the Torrens system. The points of excellence in which it is most conspicuous are thus summarised:—

1. The initial adoption of the system is voluntary.
2. When land is once registered all dealings must be by registered disposition alone, not merely as a protection against strangers, but even to complete the legal title of the parties as between themselves.
3. The state guarantee of title and concomitant liability to compensate persons injured by the action of the Registry officials.
4. Land, not persons, taken as the basis of the index.
5. The Duplicate system of Certificate of Title and concomitant regulations as to noting the certificate with all registered dealings, whereby every owner has in his possession, at all times, for the immediate satisfaction of intending purchasers, a true copy of every subsisting entry in the Register books.
6. Power to charge by equitable memorandum and deposit of certificate of title.
7. Quasi-judicial instead of merely ministerial character of the Registrar.
8. The system is metropolitan, not local.
9. Low rates of fees.
10. Abolition of all technicalities attending the execution of instruments, and the promulgation of printed forms for all usual dealings.

It will be observed that some of these features are possessed by many systems: all by none. The Absolute title and the Duplicate certificate are possessed by no European system—not even the Prussian—except the grain of mustard seed furnished by our own Land Registry Titles. The Duplicate Certificate system on which the author lays great stress is attended with some difficulties in practice, but we are glad to observe that it is an integral feature of the Lord Chancellor's pending Land Transfer Bill, as it is the only way to save landowners the expense and inconvenience of searches on dealings.

The application of the system is being earnestly demanded in Algiers, and the Governor-General in 1886 promised it at an early date; it is said to be specially and almost unexpectedly well adapted to the semi-civilised conditions of tenure met with among the native populations. In Tunis it was in substance established in 1885, and has acted hitherto with perfectly satisfactory results.

In one respect, and in one only, the author places the Prussian system of 1872 above the Australian; namely, in a feature which has already been brought to the notice of English readers in this periodical [1], under the name of the Negotiable Mortgage. In respect of the Land Index (one of the other notable features of the Torrens system) it appears that the Prussian registry, at whatever date it be observed—1704, 1794, 1829, 1872, has always proceeded on a territorial rather than a personal basis. This was the result of notions inherited from the earliest traditions of the Teutonic races, and is observable (as our author shows) in almost all systems based on origins independent of Roman law.

The French system is a system of registration of assurances, with an index of names, highly localised, and with certain ancillary institu-

[1] 'Registration of Title in Prussia,' Law Quarterly Review, January 1888. See p. 68.

tions of a quasi-judicial character—such as the 'purge,' which is resorted to on important sales, involving an official inquiry, public notice, and a certain delay (something like our old Fines and Recoveries); this in practice appears to be relied on for clearing away all doubts, but in theory leaves possible remote claims outstanding. As long, however, as the Government charges a stamp duty of *ten per cent.* on every sale (compare the English duty of ½ per cent. only)—by which we are told a revenue of 520,216,000 francs (over £20,000,000) was realised in 1885—all other questions seem likely to appear insignificant to the landowner; for, as to the alleged uncertainty of titles, it seems evident, from the lack of examples of eviction and loss, that where people are properly advised they run no practical risk.

The Luxembourg reform is a project for remodelling the registry of deeds and reducing the fees chargeable; but of course this latter is rather a fiscal than a legal question.

The book is a marvellous storehouse of research, both ancient and modern, and is written with the perspicacity of style which seems the peculiar property of French scientific literature. We learn from the author that it is approaching a second edition, and have moreover the less compunction in quitting it with this brief and inadequate notice, in that we feel sure we shall draw largely on its supplies at the not very distant date when its subject-matter will demand something more than a cursory treatment.

Company Precedents for use in relation to Companies subject to the Companies' Acts, 1862 to 1883. With Notes. Fourth Edition. By Francis B. Palmer and Charles Macnaghten. 1888. London: Stevens & Sons. La. 8vo. lxx and 1031 pp.

Mr. Palmer's Company forms are, as he tells us in the Preface to his new edition, the mainstay of thousands in them that read him and keep his precedents. The additions contained in this edition comprise a very useful chapter on 'Promoters' which should be of great value to both branches of the profession, and also to the Promoters themselves. Mr. Palmer sums up (at p. 27) his experience on this subject in some very wise recommendations to intending promoters, the only comment whereon which will, we fear, be made by the majority of 'professional' and 'occasional' promoters is, that it instructs them how to comply with, and not how to evade, their duty to the public.

The recent decision of Kay J. in *Re Faure Electric Accumulator Company* (W. N. 1888, p. 216) materially affects Mr. Palmer's note on 'Underwriting' (p. 23), and, if supported on appeal, will probably have a wider bearing on the subject of commissions generally than the judgment, as noted in the Weekly Notes, would seem to imply; for it is difficult to see how the mere insertion of the power to pay such commissions in the Memorandum as objects of the Company will make such payments *intra vires*.

Since the last edition of Mr. Palmer's work two very important decisions have been given in *Trevor* v. *Whitworth* (12 App. Cas. 409) and *Re Almada and Tirito Company* (38 Ch. Div. 415), the one supporting, and the other opposed to, Mr. Palmer's opinions as expressed in his earlier editions. *Trevor* v. *Whitworth* in finally deciding the vexed question as to the power of a company to purchase its own shares carries out the views of Mr. Palmer, Mr. Buckley, and many other learned company lawyers. *Re Almada and Tirito Company*, as decided by the Court of Appeal, is on the other hand opposed to the opinions of Mr. Palmer and of many

of the most eminent counsel at the bar. It is of course far reaching in its effects, and it will be interesting to see how the point will be decided when it is taken to the House of Lords. Having regard however to the tendency of the speeches of the noble lords in *Trevor* v. *Whitworth*, it seems unlikely that they will disagree with the Court of Appeal. The decision in *Re Almada and Tirito Company*, together with that in *Re Faure Electric Accumulator Company* (referred to above) and others, on such questions as that of a company entering into agreements with contractors for payment of interest on share capital during construction of works and before any interest is earned, call forth the common form complaint of Directors that 'the company cannot be carried on under such restrictions,' and suggest the possibility of some modification of the existing law being obtained from Parliament in the near future.

Mr. Palmer repeats (p. 386) his doubts as to the operation of section 17 of the Bills of Sale Act, 1882, upon debentures. This question is, since the decision in *Re Burdett* (20 Q. B. Div. 310), of comparatively small commercial importance, but the practical consequences of raising the doubt at a time when, owing to the loose expressions used in several cases, it was believed that non-registration of a deed including personal chattels rendered the whole deed void, gives an insight into the reasons why heretics were so promptly burned in less civilised times.

We might suggest to Mr. Palmer, in view of his next edition, that some forms of Debenture Trust Deeds where the property of the company is exclusively foreign land or foreign patents would be of great practical value, but this suggestion exhausts any criticisms that we have to make on the forms themselves.

Chitty's Index to all the Reported Cases decided in the several Courts of Equity in England, &c. The Fourth Edition. By Henry Edward Hirst. Volume VII, containing the titles 'Solicitor' to 'Vendor and Purchaser.' London: Stevens & Sons; H. Sweet & Sons; W. Maxwell & Son. 1888. La. 8vo. viii and 6371–7363 pp.

We must confess ourselves disappointed in the seventh volume of the new edition of 'Chitty.' It is as true of the seventh as of the sixth volume, that it shows no falling off from the high standard of laborious accuracy with which Mr. Hirst may justly be credited. But we had hoped that this seventh volume would have contained the list of Equity cases which will be one of the most useful features of the entire work. The practitioner—and there are many such—who is not the possessor of the voluminous series of Chancery Reports will turn for a case *nominatim* to the list with which 'Chitty' will, it is hoped, conclude, and he will be referred at once to its headnote in the body of the work. This will be the acme of practical usefulness to which this invaluable Digest will attain. It is the misfortune of the work being now done by a single hand that the Digest can hardly be published as a whole as was 'Fisher's.' Early in 1885, Fisher's Digest of all the Common Law cases from 1756 to 1883 was published as a whole, table of cases and all, in seven volumes. We are entering on 1889 when these lines are published, and we are not yet in possession of the whole of 'Chitty's Equity Index,' 'from the earliest period down to the end of the year 1883.' It is not that we quarrel with Mr. Hirst for being slow. Far from it. He brings out his volumes as quickly as, or more quickly than, any other single hand could, we dare to say,

produce them. We noticed volume VI in these pages last July, and volume V only last January. No one could work faster than Mr. Hirst does. But how is it that he has no assistant? Either we must have a formidable supplement of cases in the years from 1884 to 1889 inclusive, or else 'Chitty' will not be 'up to date.' Taking however with a grateful heart what is given us, we find in this seventh volume some very important titles, notably those with which it makes its entrance and its exit, 'Solicitor' and 'Vendor and Purchaser.' There are besides, 'Specific Performance,' 'Stoppage in Transitu,' 'Tithes,' 'Trade Mark,' 'Trustee Acts' and 'Trusts,' 'Turnpike' and 'Usury,' among the titles of 'light and leading,' and as far as we can see, the work is done as carefully as ever. As we turn over the pages, we wonder whether English lawyers will ever see the codification of case law to which Lord Westbury aspired? Will there ever be an authoritative elimination of what is obsolete and contradictory, a succinct and orderly arrangement of the law which has been made by judges? If ever such there be, Mr. Hirst may fairly claim to have done much by amassing and arranging materials towards bringing about that desirable consummation.

The Law relating to County Councils. By C. N. Bazalgette and G. Humphreys. London: Stevens & Sons. 1888. La. 8vo. xxxii and 407 pp. Second Edition, xxxii and 411 pp.

The County Councillor's Guide. By Henry Hobhouse, M.P., and E. L. Fanshawe. London: W. Maxwell & Son. 1888. 8vo. xxiii and 294 pp.

A Popular Summary of the Law relating to Local Government. By G. F. Chambers. London: Stevens & Sons. 1888. La. 8vo. 80 and (index) 16 pp.

We have here three new works on the Local Government Act of last session. The work of Mr. Chambers is avowedly popular, and therefore differs in character from the work of Messrs. Bazalgette and Humphreys and from the work of Messrs. Hobhouse and Fanshawe, which aim at all the completeness possible to an exposition of a statute whereof the greater part has not yet come into operation. Even these do not strive after originality, nor is it desirable that they should be original. The Local Government Act of 1888 is in itself a lengthy and elaborate statute. It incorporates by express reference many provisions of many older statutes, and in particular more than half of the Municipal Corporations Act of 1882, one of the longest Acts on the Statute Book. Thus the whole arrangement and the bulk of the matter for a book upon County Councils have been supplied by Parliament ready-made. The inevitable cases have not yet begun to accrue, and all that the editor has to do is to trace the connections of the new Act with former legislation upon local government.

That Messrs. Bazalgette and Humphreys have performed this task satisfactorily is better evidenced by the fact that their work is already in a second edition than by the word of a reviewer. Their notes follow no rigid rule in citing the older statutes. In some instances only the reference is given; in others the effect of the enactment is shortly stated; in others the enactment itself is set out at length. But this freedom is justified by the unequal importance for the present purpose of former Acts, and also by the necessity of keeping the book within a manageable size. Besides, the authors are entitled to refer to their well-known work upon Local and Municipal

Government, which has been issued in a new edition and, together with the present volume, contains the whole of the law relating to that subject. In general the notes are clear and precise. A compact Introduction enables the reader to take a comprehensive view of the many changes effected by the great Act of 1888. A full analysis of Acts defining the powers, duties and liabilities of the old Metropolitan Board of Works is given in the Appendix.

The County Councillor's Guide is a work more portable and less luxurious to read. It contains in smaller type nearly as much matter, and sometimes gives the condensed substance of enactments where the book of Messrs. Bazalgette and Humphreys gives only a reference. This difference of method seems reasonable enough if we remember that Messrs. Bazalgette and Humphreys write chiefly for lawyers, who always have the original authorities at hand and are bound to consult them, whilst Messrs. Hobhouse and Fanshawe write chiefly for the county councillor, who will not often be a lawyer, and will need a compendium of the law. Both of these books are good, although not exactly in the same fashion.

We have said that Mr. Chambers' book is distinct in scope from the other two. Its title is rather a misnomer, since this Popular Summary of the Law relating to Local Government is almost solely concerned with the Act of last session. It is however sensible and useful, and contains quite as much law as any but a few laymen will have stomach for. It sets out the provisions of the Act in language slightly modified, and gives references to former Acts, but nothing more than references.

Cambridge Legal Studies. By E. C. Clark, Regius Professor of Civil Law in the University of Cambridge. Cambridge: Deighton, Bell & Co. London: Geo. Bell & Sons. 1888. 12mo. iv and 122 pp.

In this neat little book Professor Clark has set forth all that a Cambridge law student, or those interested in his career, ought to be informed of, and a good historical chapter besides. We agree with most of what Prof. Clark says about legal education. His vindication of Roman law is both just and temperate, and his remarks on the importance of adding at least a selected title of the Digest 'to the necessarily standing book-work of the Institutes' are especially commendable. As for the 'linguistic difficulty' of the requisite knowledge of Latin, it appears to us that persons who do not know Latin may be qualified to be lawyers, but are not therefore, nor of right ought to be, qualified for the honourable distinction of a University degree in the Faculty of Law.

On the historical significance of the title *legum doctor*, Prof. Clark maintains, we think rightly, that *legum* is not a synonym of *utriusque iuris*, but rather means Civil as opposed to Canon Law. There were once separate degrees in the latter; the latest examples of such appear to have been in the Marian reaction. Nowadays *legum doctor* may be justified by reading *leges* in another recognized medieval sense, as simply equivalent to *ius*. The Oxford style of B.C.L. and D.C.L. is a survival which cannot be rationalized. In point of fact the B.C.L. degree now signifies a competent acquaintance with English as well as Roman law.

We will add one word on a practical point. It is to be hoped that the time is coming when the Inns of Court, instead of allowing the legal honours of Oxford or Cambridge only as a dispensation from part of the Bar Examination, will allow the B.C.L., or the Cambridge LL.B. as it will be

under the new scheme which begins to work this year, as a complete title for call to the Bar so far as examination is concerned. Unless the present Bar Examination is much maligned, there would be an ample margin of security. Of the University of London we say nothing just now, because we hope, ultimately, for still better things in that quarter.

The Threefold Division of Roman Law as set forth in the text of Gaius. By Wolseley P. Emerton, D.C.L. London: Stevens & Sons. 1888. 8vo. 34 pp.

Dr. Emerton is of opinion, with Duarenus and Böcking, that the well-known statement, 'omne ius quo utimur vel ad personas pertinet vel ad res vel ad actiones,' is not an exclusive division of the subject-matter of law, but a distinction of aspects which co-exist in the same subject-matter; not an enumeration of legal categories, but a specification of the modes in which facts acquire legal import, or what might be called in German the *moments* of the legal view of human affairs. It is not that a given legal topic must belong to Actions if it belongs neither to Things nor to Persons; but that we may regard a given topic or case, as we please, from the point of view of the legal capacity of the persons concerned, or of the objects of legal duties and rights which are involved, or of the claims and remedies available. Are the persons free or bond, Roman, Latin, or alien? Are they dealing with ownership, obligation, succession? Shall Gaius or Marcus have an action against Sempronius or Titius, and if so, in what form? There is much to be said for this view. Dr. Emerton's contribution to it is a close and minute philological argument to the effect that the received interpretation would require *aut* instead of *vel* in the text of Gaius. We are not sure that he succeeds in proving that the use of *vel* and *aut* in the Latin of the Digest is uniform and correct without exception. But we do think it probable that Gaius would have used *aut*, not *vel*, if his meaning had been what it is commonly taken to be. Different students will give a different amount of weight to reasons of this kind: where the question is fairly open on other grounds, they are certainly entitled to some weight.

International Law. An Introductory Lecture. By J. Westlake, Whewell Professor. 8vo. 16 pp.

Why the History of English Law is not written. An Inaugural Lecture. By F. W. Maitland, Downing Professor of the Laws of England. 8vo. 20 pp. London: Cambridge University Press Warehouse. 1888.

Mr. Westlake and Mr. Maitland have both made a good start. Mr. Westlake boldly vindicates the law of nations, as a real though peculiar species of law, against the pedantic heresy which calls it 'positive international morality;' and he goes on to point out that in fact there is the same difference between law and morality in the affairs of nations as in the affairs of citizens within a nation. There is always a body of undefined but active moral sentiment in advance of the 'jural sentiment' which is embodied in positive rules. Parts of this may become from time to time defined, and take rank as fixed rules, in other words become law by ceasing to be morality. This view seems both historically and philosophically just.

Mr. Maitland gives reasons in his pointed and humorous manner—only too good reasons—why the Common Law still awaits its historian. That

historian must be a good modern lawyer, and the competent modern lawyer will seldom have much time to give to history. But meantime there is much useful work within the means of many students, if only they will use their opportunities.

We have also received :—

Wilson's Practice of the Supreme Court of Judicature, containing the Acts, Orders, Rules, and Regulations relating to the Supreme Court. Seventh edition. By CHARLES BURNEY, M. MUIR MACKENZIE and C. ARNOLD WHITE. London : Stevens & Sons. 1888. La. 8vo. cxxxii and 983 pp.

The Annual Practice, 1888–9. By THOMAS SNOW, HUBERT WINSTANLEY and FRANCIS A. STRINGER. London : W. Maxwell & Son, and H. Sweet & Sons. 1888. 8vo. cxvii and 1337 pp. *Supplement to the above*, containing the Pay Office Statutes and Rules, Rules of the Supreme Court under Statutes (other than Judicature Acts), Lunacy Orders, and Appeals to House of Lords. By T. SNOW, H. WINSTANLEY and F. A. STRINGER. London : W. Maxwell & Son, and H. Sweet & Sons. 1888. 8vo. ix and 181 pp.—The new editions of both these works show the conflict of the editors' ingenuity with the problem of keeping down bulk. 'Wilson,' with its large octavo page, still prefers to take the risk of exceeding in height and being hardly portable ; the 'Annual Practice' has taken refuge in putting the statutes and rules of less constant utility into a supplemental volume, and even so the principal volume is an overgrown handful. It must be a Sisyphean task to edit practice books, and we should feel much indebted to those who have the patience to do it, and the care and skill to do it well.

Select Cases and other authorities on the law of Property. By JOHN CHIPMAN GRAY, Royall Professor of Law in Harvard University. Vol. I. Cambridge (Mass.) : Charles W. Lever. 1888. La. 8vo. xvi and 791 pp. —We have not yet thoroughly examined this book ; but it is evidently a most useful and instructive collection. If a good index is added when the work is completed, it will be of considerable use to practitioners as well as students. In this country it is specially acceptable as a guide to interesting and profitable American decisions which the English reader does not easily find otherwise. Many good Year-Book cases are also translated.

The Powers, Duties, and Liabilities of Executive Officers, as between those Officers and the Public. Third Edition. By A. W. CHASTER. London : W. Clowes & Son, Limited. 1888. 8vo. xxvii and 419 pp.—It appears to be Mr. Chaster's good fortune or his enterprising design to bring out a fresh edition of his book on Executive Officers in the autumn of each year. The book was first published two years ago, and the third edition is now before us. The Liabilities of Executive Officers generally, and the Rights and Duties of Sheriffs, Police and Gaolers, are treated of more elaborately than in the edition of last year. Otherwise the book is not much altered, and may continue to be moderately commended.

Manuel de la propriété industrielle. Par CÉSAR NICOLAS et MICHEL PELLETIER. Paris : Quantin. 1888. 296 pp.—This little work has a special value, owing to the fact that the authors occupy official positions at the Ministry of Commerce, and that the enforcement of the Industrial Property Convention of 1883 is among the duties of M. Nicolas, who is at the head of the Home Trade Department. These gentlemen, moreover, represented France at the Conference at Rome two years ago, and in fact have given

particular attention to matters connected with the Convention. Their book contains a number of ministerial documents not usually found together. Though addressed rather to the laity than to the legal profession, the opinions of its authors are useful in view of their more or less representing official opinion.

Der Erwerb der Gebietshoheit. Von Dr. KARL HEIMBURGER. I. Teil. Karlsruhe: Druck der Braun'schen Hofbuchdruckerei. 1888. 155 pp.—This is the first part of an essay on a department of International Law which has recently become one of the first importance, viz. the Assertion of Territorial Supremacy. Dr. Heimburger in the present part of his work deals particularly with the nature of supremacy and the modes of acquiring it.

Notes pour servir à l'histoire littéraire et dogmatique du droit international en Angleterre. Bruxelles: C. Muquardt. 1888. 1ère partie. 148 pp.—Under this unpretending name, M. Ernest Nys, the able young Brussels professor, has begun a valuable contribution to the history of International Law in England. We hope to say more of this work when it is farther advanced.

Report on Extraterritorial Crime and the Cutting Case. Washington: Government Printing Office. 1887. 130 pp.—The author of this *exposé*, Mr. John B. Moore, the third Assistant Secretary of State, gives a careful and thoughtful survey of laws, opinions and precedents connected with this difficult subject. It goes without saying, that Mr. Moore fully justifies the action of the United States Government in the Cutting case.

L'equilibrio europeo studiato ne' trattati de' secoli XVI. et XVII. Catania: Giacomo Pastore. 1888. 147 pp.—A dissertation by a young Italian advocate, Michele di Gisira, for admission as a Professor of the University of Rome. It is a useful summary of the progress of the principle of the balance of power in Europe as laid down in the treaties of the sixteenth and seventeenth centuries.

La legge e la libertà nello stato moderno. Parte prima: la legge nello stato moderno. By ATTILIO BRUNIALTI. Torino: 1888. La. 8vo. 310 pp. —An apparently careful and well-informed study of legislative methods and procedure. Signor Brunialti touches in one or two places on codification: he does not seem to have heard of the Anglo-Indian codes.

Le origini del diritto romano . . . per Giuseppe Carle. Torino: 1888. La. 8vo. viii. and 633 pp.—The chief topics are: The constitution of Italian society in the præ-Roman period; the early history of property (*ager publicus, ager gentilicius*, etc.); general ideas of rules of life (*fas, mos, ius*); early patrician law (*connubium, commercium*); the law of peace and war; the development of the *plebs*; the *populus* under the patrician system, and the constitution of the regal period; the Servian constitution; the *ius quiritium* in its early form, and the development of procedure through the *legis actiones*. Signor Carle seems to have consulted and considered all the recent literature of the subject, using by preference, however, French translations of English and German works when they are to be had.

The American Commonwealth. By JAMES BRYCE, M.P. 3 vols. London: Macmillan & Co. 1888. 8vo. xxxi and 592, ix and 683, ix and 699 pp.

Études d'Histoire du droit. Par RODOLPHE DARESTE. Paris: L. Larose et Forcel. 1889. 8vo. xii and 417 pp.

*** *Several other notices of books received are postponed for want of space.*

NOTES.

It seems convenient to repeat in a conspicuous place that it is not desirable to send MS. on approval without previous communication with the Editor, except in very special circumstances; and that the Editor, except as aforesaid, cannot be in any way answerable for MSS. so sent.

Real Property Law in New Zealand.

A correspondent sends us the following information as to the points in which English law has been departed from:—

1. Estates *in futuro* may be created by deed;

2. In lieu of the Rule in Shelley's case, where there is a limitation to a person for life followed mediately or immediately by a limitation to his heirs or the heirs of his body, our rule is that the two limitations shall not coalesce so as to form one estate;

3. A husband may convey to his wife, or a wife to her husband, either alone or together with other persons;

4. A man may convey to himself jointly with another, or others;

5. A mortgagee is not entitled to foreclose the equity of redemption;

6. An equitable mortgage by deposit of the title deeds cannot be effected;

7. On intestacy realty as well as personalty passes to the personal representative for division according to the Statute of Distributions;

8. Sealing, formal delivery, and indenting are unnecessary. There is consequently no such thing as an escrow in New Zealand;

9. Tenancy from year to year arising by implication of law has been abolished;

10. On the death of the mortgagee, his personal representative alone is clothed with the power to reconvey.

These are only specimens.

With regard to Land Transfer and Registration, there are two systems working side by side, namely (1) registration of deeds, the older plan, and (2) title by registration, or the Torrens system, introduced by our 'Land Transfer Act, 1870.' All land granted since 1870 is *ipso facto* subject to this Act, whilst land granted prior to that year may on application be brought under its provisions. Where, for example, the deeds show a defective legal but a good holding title, this last-mentioned course is adopted; the expense seldom exceeds £20. Under the older system the deeds simply are registered, commencing with the Crown Grant, the foundation of every title in the Colony. The method of searching titles is surprisingly simple. You enter the Deeds Office of the district wherein the land is situated, proceed to the Local Index Book, in which you look for the parish wherein the land is, and opposite the number of the lot, or section, for which you are searching, you find the Title Index. You then turn to the Title Index, and see there tabulated all the deeds which have been registered against the land, with the volume and page of the Record Books wherein the respective deeds are recorded verbatim. Registration is practically compulsory. A conveyance, for example, whether founded upon valuable consideration or not, when duly registered has priority over every unregis-

tered instrument, excepting in the case of notice affecting the person who has registered with fraud. The defect, however, of the Deeds Registration system is the rapid multiplication of deeds to be searched, which registration of titles does not involve. New Zealand lawyers look to the gradual passing of land under the Land Transfer Act to relieve them from this evil, the labour of searching voluminous records being thereby rendered unnecessary. Dare I, however, venture the opinion, derived from colonial experience, that compulsory registration of deeds is a powerful auxiliary in the endeavour ultimately to secure the general adoption of the plan of registration of titles?

From the lawyer's point of view, simplicity in conveyancing matters seems to have proved more profitable than cumbrousness. A Provincial District, which has a population of little more than 100,000, shows the following instructive particulars:—

Deeds Registration.	Deeds of every kind registered within the period from 1st May, 1883, to 1st May, 1888		42,782
Land Transfer Act.	Transactions for the same period:—		
	Transfers	7,778	
	Mortgages	5,995	
	Reconveyances (about)	5,000	
	Leases	483	
	Transfers and Surrenders of Leases (about)	200	
			19,456
	Powers of Attorney deposited under both systems (about)		5,000
	Total for five years		67,238

Since the foundation of the Colony, the population of which is only about 600,000, that is to say within a period of 48 years, 980,000 deeds have passed through the various Deeds Offices of New Zealand. The figures, which are given on official authority, speak for themselves.

Quomodo fit quis Juris Doctor?—The steps to be taken for obtaining the degree of *Doctor juris utriusque* in Germany are not quite uniform in all the Universities, but it will be sufficient to take as a typical case the regulations established for the University of Munich.

A candidate has to produce satisfactory evidence of his having been a student in one or more German Universities for at least four years, (by an ancient custom the German, Austrian, Dutch and Swiss Universities are for that purpose deemed to be German Universities). The faculty may however, in the case of candidates who are not subjects of any German State, relax this rule according to the circumstances of the case.

Before being admitted to the examination the candidate must submit an original dissertation on some legal subject written in German or Latin. A previously published work is accepted for that purpose. One of the members of the Faculty is appointed to report on the dissertation; his report, together with the dissertation, circulates among the other professors; and if the candidate's work is found satisfactory, a day is fixed for the viva voce examination. All the professors of the Faculty are entitled to be present at this examination, and to take part in it. A candidate can, therefore, not know beforehand what subjects he will be examined in and must be prepared for all contingencies, as questions on any branch of

law may be put to him. The examiners will, however, give him a fair chance, and if a particular set of questions proves too troublesome for him, they will start on some other track, as it is considered of more importance that a candidate should give evidence of independent work than that he should have a universal smattering. Of course the elementary parts of all the subjects of the examination must be familiar to him. In Roman Law, questions are asked on the history of the principal parts of the law, and a fair acquaintance with Gaius and the whole of Justinian's compilation is expected, as well as a knowledge of the modern development. The examiner will probably choose one particular title of the Digest and use it as the starting-point for digressions into other branches. German private law is rather a mixed subject, as it comprises all parts of the private law administered in Germany, in so far as they are not derived from Roman sources (the mercantile law is, however, generally treated as an independent subject). The student may be examined on a passage in the lex Salica as well as on some legislation of the current year; he may be asked to describe the mutual rights of husband and wife as stated in the Sachsenspiegel, or to give a summary of the law of mortgage as administered at present in the different German states; for although the local laws of the German states are not to be made special subjects of the examination, they are expected to be known in so far as they illustrate the varying forms of any particular legal institution. The examination in criminal law may also touch upon a variety of subjects; the philosophy of criminal law and the history of the different theories relating to the same are expected to be known, as well as the main features of the system of crimes and punishments referred to in the German criminal code; a fair knowledge of Roman criminal law and of the history of German criminal law is required, and if it happens to be known that the student has given some attention to foreign systems he must also be prepared to be questioned on them. Ecclesiastical law is another subject; it comprises the history and composition of the *Corpus juris canonici*, the organization of the Roman hierarchy, and the constitution of the various protestant churches. The laws of marriage and divorce may also be touched upon, in so far as they are affected by the canon law and the decrees of the councils. The examination on civil procedure dwells on the contents of the modern German code, but may also branch off into the history of the older systems. Criminal procedure, constitutional history, constitutional law and international law are dealt with in a corresponding manner. A candidate who has worked properly and takes an interest in the subject may be a little nervous at first, but he is soon made to feel at ease, and as some of the examiners are always men of great eminence, the interesting and enlightened way in which they handle their subjects cannot fail to have a stimulating effect. The candidate feels when he is on the right way, and a sympathetic relation is established between him and the examiner which encourages him and enables him to do his best. The system is not free from certain dangers, but on the whole it works well. It would work still better if a certain proportion of the examiners were taken from other Universities.

Immediately after the examination, those of the professors who have been present decide whether the candidate is to be admitted to the act of promotion. If the result is favourable, the candidate has to submit an address on a subject chosen by himself, as well as a certain number of theses (generally about twelve) relating to different branches of law. These being approved of, a day is fixed for the ceremony, which takes place

in the hall of the University. The *doctorandus* has in the first place to read his address, which occupies about half-an-hour. This being done, the disputation is opened. The theses submitted by the candidate have to be printed and distributed on the day preceding the promotion, and three official opponents have to be chosen by him from the students or the younger graduates of the University; these, as a rule, inform him of the theses they intend to dispute, but as it is open to the professors or any members of the public who are present to attack some of the other theses, the *doctorandus* must be prepared to defend any one of them. The opponent generally begins by inviting the candidate to explain the exact meaning of his proposition, and he then states as concisely as possible the arguments he has to urge against it. Then the different points at issue are argued separately on each side until the time which by tacit convention is allowed for each thesis is exhausted. As long as these disputations had to be carried on in Latin they were but rarely genuine, as neither the candidates nor the opponents felt sure enough of their scholarship to risk an unprepared contest; at present they are real enough, as the opponents are anxious to display their dialectical powers, and, having only one particular thesis to prepare for, can do themselves full justice. I do not think that a candidate is ever refused the degree for failing to acquit himself satisfactorily in the disputation, but the manner in which he has withstood the attack is taken into consideration when the final predicate to be inserted into the diploma is decided upon by the Faculty. There are four 'predicates,' of which *summa cum laude* is the highest.

In many German Universities the disputation has been abolished altogether, but it seems to have real advantages. It is not exactly a test of knowledge, but it is a test of faculties which in a lawyer are as valuable as knowledge. Moreover, the candidate's qualifications are, to some extent, made visible to the public eye, which would probably discover any permanent lowering of the standard. The same reasons speak for the public reading of the address.

Those who have witnessed one of these ceremonies will retain a pleasing and profitable remembrance. The medieval colouring which pervades the whole function does not merely satisfy romantic tendencies; it illustrates the continuity and catholicity of academic life, and the solemnity and pomp of the occasion are well calculated to impress those whom the University sends forth with the wish not to show themselves unworthy of the scene which has marked the beginning of their career. E. S.

Butler v. *Manchester, Sheffield, and Lincolnshire Railway Co.* (21 Q. B. Div. 207), is a case of interest and importance. It decides that a passenger who has lost his ticket, but declines to pay (in compliance with the ordinary form of by-law to that effect) the fare from the station from which the train started, cannot be removed by the Company as a mere trespasser. The result of the judgment is probably beneficial, but the reasoning is not very clear or satisfactory. It is somewhat as follows: Assuming the by-law to be valid, but that the contract of carriage can only be rescinded by the Company upon a breach by the passenger going 'to the root' of it, the refusal to pay a sum in the nature of caution-money (when, as here, the fare has been paid) cannot be deemed such a breach. Now, if the by-law be unreasonable, it is clear the Company were wrong; but if it be reasonable, it is difficult to avoid the conclusion that the breach of it may go to the root of the whole contract. But the Court took a middle course, declining to decide the question of validity, and in fact

determined little more than that the Company were in the wrong. This vagueness is not decreased by the view expressed in regard to *Wood* v. *Leadbitter* (13 M. & W. 838). The principle of that case surely would not have been inapplicable if, as the defendant's counsel contended, the plaintiff's conduct had given them the right to determine the contract.

The Lancashire and Yorkshire Railway Co. v. *Greenwood and Sons* (21 Q. B. D. 215) decides that sec. 2 of the Railway and Canal Traffic Act of 1854, which provides that no 'proceeding' shall be taken in respect of undue railway charges made in contravention of the Act, applies not only to prevent the prosecution of an action, but also the raising of any set-off, counter-claim, or defence based on undue preference, the general intention of the statute being to withhold the discussion of all such questions from the ordinary tribunals.

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(1) *Osborne* v. *L. & N. W. Railway Co.* (21 Q. B. D. 220) is the logical result of the views expressed in *Yarmouth* v. *France* (19 Q. B. D. at p. 657) on the application of the maxim *Volenti non fit injuria*. In *Woodley* v. *Metropolitan District Railway Co.* (2 Ex. Div. 384) the majority of the Court in a considered judgment rejected the view expressed by Mellish L.J., one of the dissentient judges, that to make out the defence of *Volenti*, etc. you must make out such a recklessness or willingness as amounts to quasi-contract, and that in estimating a man's intent you may take into consideration such motives as the fear of the loss of employment, etc. The view of the L.J. however received new countenance in *Yarmouth* v. *France*, which case has been followed in this respect by other judges. See per Hawkins J. in *Thrussell* v. *Handyside* (20 Q. B. D. at p. 364) and per Grantham J. in this last case.

(2) This case is a good illustration of the principle that the burden of proving the plaintiff's acceptance of the risk lies in the first instance on the defendant, and is not discharged by him by the proof only of possible or partial knowledge and appreciation of the danger. Cf. *Dublin, Wicklow, and Wexford Railway Co.* v. *Slattery* (3 App. Ca. at p. 1176), *Wakelin* v. *L. & S. W. Railway Co.* (12 App. Ca. at p. 47), *Thomas* v. *Quartermaine* (18 Q. B. Div. at p. 697).

Kellard v. *Rooke*, 21 Q. B. Div. 367, and *Walsh* v. *Whiteley*, 21 Q. B. Div. 371, are cases which deserve attention. There is nothing in them extraordinary; there is no reason to doubt that in each case the decision of the Court of Appeal was right. But for all this the two cases, which are mere samples of their kind, merit observation. They both illustrate the untold practical evil produced by that kind of fragmentary legislation which because it is not grounded on any clear theory is assumed to be in conformity with common sense. Both cases are decisions under the Employers' Liability Act, 1880; they both show that whether a workman can recover damages from his employer for injury done by a fellow servant depends, under the legislation by which the intelligence of Parliament has added to the complication of the Common Law, on a variety of petty circumstances and on subtle questions as to the meaning of an ill-drawn statute. Now this state of things is in itself condemnatory of the existing law. The relations between masters and workmen ought to be regulated by clear rules based on broad intelligible principles; for even a bad rule which is understood causes in such relations far less suffering and evil than a rule which, though intended to be fair, is in fact unintelli-

gible and therefore uncertain in its operation. When Parliament was called upon to deal with rules affecting the liability of employers for accidents to their workmen, there were only two intelligible courses open to the Legislature. The one was to leave the law alone. Whether this course would have worked great injustice may be well open to doubt; when people know what the law is, and their freedom of contract is not hampered, they can generally carry out contractual arrangements which guard against any practical injustice resulting from the condition of the law. The other course was to abolish the so-called 'doctrine of common employment.' This would have simplified the law, would have completely satisfied the claims of the workmen, and would have inflicted upon employers no great injury. Any injustice to employers would moreover have been met by the doctrine of contributory negligence. Members of Parliament refused to take either course. They sanctioned an enactment which may be described as a series of exceptions modifying an exceptional rule, and themselves modified by a series of hardly intelligible provisos. In consequence, workmen who complained of Judge-made law, which at any rate was intelligible, have been placed under a Parliament-made law which neither employers nor workmen, nor lawyers can understand. The rigour of the Judges caused less suffering than the incompetence of Members of Parliament. To make the matter worse, the rights conceded to workmen have been encumbered with petty and vexatious provisions about notice of action. If the substantive enactments of the Act are just, these so-called safeguards are unjust; if the Act without them would not be just, they are not enough to make it so.

Henderson v. *Preston*, 21 Q. B. Div. 362, reaffirms the principle that the governor of a gaol who keeps a prisoner in confinement under a warrant good on the face of it is protected. 'The warrant is good and protects the governor. No more need be said.' These are the words of Mr. Justice Stephen; they are adopted by the Court of Appeal. The oddity of the thing is that any man should have thought it worth while to call in question an obviously sound and elementary legal principle. The plague of the Courts is the existence of persons who cannot appreciate the force of Mr. Justice Manisty's remark, 'Common sense is in such matters a better guide than authority.'

A man who makes a statement on which he knows that another person may act is liable if, having made it recklessly, it turns out to be untrue, and the other, acting upon it, is injured. The fact that the maker of the statement is in no way interested in the transaction does not affect his liability.

Such is the effect of *Cann* v. *Willson* (39 Ch. D. 39), the latest decision as to the effect of statements not known to be false but made with a reckless disregard of their truth.

Chitty J., in giving judgment, rested his decision partly on *Heaven* v. *Pender* (11 Q. B. Div. 503) as to the duty incurred by the maker of a statement to those who are likely to act upon it, partly on *Peek* v. *Derry* (37 Ch. Div. 541) as to the right of action arising from false representation. But both of these cases are clearly distinguishable, and neither goes so far in the imposition of liability as does *Cann* v. *Willson*. For in *Heaven* v. *Pender* the defendant was admitted to be interested in work to be done on the staging which he had negligently set up, though he did not employ the plaintiff to do the work. In *Cann* v. *Willson* the defendant was admitted to have *no* interest in the transaction. He was asked to give a valuation, which he

gave *gratis*, of property with which he was not concerned; and he gave it without taking the trouble to ascertain the correctness of his statements.

As to *Peek* v. *Derry*—if one looks away from the *dicta* of the learned judges to the facts on which their decision was given—the case is obviously irrelevant to *Cann* v. *Willson*. In *Peek* v. *Derry* the defendant directors issued a prospectus stating that their company had powers which they knew, or might have known if they had thought about the matter at all, that it did not possess. They issued the prospectus intending that it should induce the general public to take shares in their company. The case is one of a numerous class in which directors, who are not business men, or who are business men of a hopeful disposition, make themselves responsible for statements the truth of which they have not ascertained, or statements which they know to be false at the moment but trust may shortly come true; for their own purposes they blend statement with prophecy. This is plain Fraud. The only distinction which *Peek* v. *Derry* possesses is given to it by the good-nature of the judges of the Court of Appeal, who, recognizing that the directors had told their falsehood in good faith and from carelessness rather than from corrupt motive, rehabilitated for their benefit the cast-off term 'legal fraud.' Henceforth when an action of deceit lies for reckless misstatement, or for a falsehood told in the hope that good may come of it, we may think kindly of the defendant as having only committed 'legal fraud:' and that is all that is new in *Peek* v. *Derry*.

But in *Cann* v. *Willson* the reckless statement was not made to the party who acted upon it, nor with a view to inducing him so to act; it was not made in the interest of the maker, and there was no contractual relation between the maker and receiver of the statement. We must therefore regard the case as a distinct advance in the enforcement of a liability to use due care in words or conduct.

We move fast in this direction, and *The Moorcock* (13 P. D. 157) goes a good deal further than *Cann* v. *Willson*. Here the defendants agreed that the plaintiff's ship should unload its cargo alongside of their wharf. They left it to the plaintiff to judge of the suitability of the wharf for the purpose of unloading the ship, and they gave no assurance as to the condition of the bed of the river, the soil of which was vested in the Thames Conservators. Owing to some inequality of the surface of the river-bed the vessel broke her back when the tide ebbed: and Butt J. held that though the owner of the *Moorcock* took his risk of the safety and suitability of the wharf which *did* belong to the defendants, he was entitled to damages on the ground that the invitation to use the defendants' wharf carried with it an implied representation that the defendants had exercised reasonable care 'to ascertain that the bottom of the river at the jetty was in such a condition as not to endanger the vessel using their premises in the ordinary way.'

So it seems that if a man who lends his own premises takes care to guard himself against liability in the event of their being unsuitable for the purpose, he may yet be held to have implied that he has looked to the condition of his neighbour's premises the use of which may be involved in that of his own, and may be held liable if damage arise because his neighbour has neglected to keep his premises in order. It is very desirable that we should get quit of these 'idola' of 'legal fraud' and 'implied representation,' and attain to some general rule as to the reasonable care which every one is bound to take lest his words or acts harm his neighbour, and to some limitation of the general rule by a requirement of interest in the transaction in question, or control over the thing from which harm arises. The cases under discussion are not completely satisfactory on either of these points.

The foregoing note is from a learned colleague whose opinion is entitled to great weight, but, having regard to the importance of the points involved, we think it not superfluous to present another and slightly different view.

1. The decision in *Heaven* v. *Pender* is not legitimately applied in *Cann* v. *Willson*. It belongs to a special class of cases in which personal good faith and diligence are not enough to discharge the defendant (see the following note on *Silverton* v. *Marriott*); his duty being to keep the property under his control, as regards persons coming on or near it, or using it, of common right or by the defendant's express or implied 'invitation,' as safe as by reasonable diligence it can be kept. As regards things which are absolutely dangerous the duty extends to every one who does not wilfully expose himself to the danger. An erroneous valuation, even if recklessly erroneous, can be assimilated to a rotten staging, or to an active poison labelled as a harmless medicament, only by doing violence to the ordinary principles of legal analogy.

2. Some of us may think that the facts in *Peek* v. *Derry* showed a case of 'plain Fraud,' but Stirling J. thought otherwise. Some of us may think the reasons given by the Court of Appeal for differing with him were unnecessary, but three Lords Justices thought them necessary. We may criticize as we will, but in fact *Peek* v. *Derry* is already enlarging our conceptions of actionable misrepresentation.

3. On the ground of misrepresentation *Cann* v. *Willson* does not seem to us (except on the one point that belief without rational grounds is not protected) to go beyond the old authority of *Polhill* v. *Walter*, 3 B. & Ad. 114. There the defendant had nothing to gain by his statement, and was not in any contractual relation to any one.

4. We agree that *The Moorcock* is wrongly decided. We cannot see any ground for inventing an implied undertaking in matters equally within both parties' knowledge.

5. We further agree that the law is rapidly tending towards the enforcement (contrary, no doubt, to old authorities and to some recent ones) of a general duty to be careful, as well as to abstain from wilful harm, in statements as well as in acts.

The duty of an owner of fixed property, to make it 'reasonably safe,' does not come up quite to the duty of insuring safety (such property not being in its nature highly dangerous, like dynamite, fire, or flood-water); but *Silverton* v. *Marriott* (59 L. T. R. 61) illustrates the stringency of the rule. In that case the defendant had made a private road on his land forming a continuation of a highway, but built a wall six feet high across the end of the private road barring the communication. The wall was broken down by trespassers, leaving a few inches projecting; but the defendant, though he knew the state of the wall, left it for three days unrepaired, unfenced, and unlighted, in which condition the plaintiff drove over it in the dark and was damaged, and the defendant was held liable, notwithstanding that the nuisance was created by the wrongful act of a trespasser. This is a strong case, but not stronger than *Pickard* v. *Smith* (10 C. B., N. S. 470), where an occupier was held liable for the flap of his cellar having been left open by a coal-merchant's servant who had been delivering coals, or than *Tarry* v. *Ashton* (1 Q. B. D. 314), or *Todd* v. *Flight* (9 C. B., N. S. 377). The principle of all these cases is the same, that the duty of the occupier is more than a duty of personal diligence, and cannot be shifted or delegated.

Sandford v. *Clarke*, 21 Q. B. D. 398, is important to landlords who let to

weekly tenants. *A* is injured through a defect in the condition of a coal plate in the pavement in front of a house let by *X* to *N* as a weekly tenant. The defect, it must be assumed for the purposes of the case, is not in existence at the time when *N* first becomes a tenant, but has existed for nearly two years before *A*'s accident. *X* is held liable for the damage to *A*, and his liability is placed on the ground that, having regard to the nature of the tenancy, there has been a re-letting of the premises after the creation of the nuisance making *X* liable as reversioner. The practical effect of such a decision is (it would seem) to make a landlord of premises let to weekly tenants responsible for any injury caused to third persons through the state of the premises. We see no ground to quarrel with this condition of the law, which in the view of the Queen's Bench Division results from the decision given in *Gandy* v. *Jubber*, 5 B. & S. 78. But it is curious to note the tendency of the Courts no less than of the Legislature to increase rather than to diminish the liabilities of landlords.

That a man intends the natural consequences of his acts is generally true, and the law may therefore fairly presume that he does so; but the presumption being based only upon probabilities, is not and ought not to be (speaking generally) an absolute one. The maxim of criminal law, 'Actus non facit reum nisi mens sit rea,' may be attended with some inconveniences owing to the difficulty of proving a psychological fact and the necessity of protecting society against well-meaning but mischievous fanatics, and the legislature has on grounds of public convenience in some cases, e.g. the Sale of Food and Drugs Act, made guilty intention immaterial (*Betts* v. *Armstead*, 20 Q. B. D. 771), but as a rule the safety of society does not require the truth to be excluded, and to exclude it is highly invidious to the administration of justice. The case of a man who delivers an inflammatory harangue to a mob with the result of a riot (*Reg.* v. *Burns*, 16 Cox, C. C. 355) is a strong instance for an irrebuttable presumption of criminal intent, but the safeguard in such a case is the common sense of a jury. It is not enough for the prisoner to say that he never meant to incite to riot: he has the much more difficult task of getting a law-abiding jury to believe him.

Civil rights must always be subordinated to state policy, and on this ground state papers have in civil actions been uniformly held privileged from production (*Home* v. *Bentinck*, 2 Bro. & Bing. 162; *Smith* v. *East India Co.*, 1 Phillips 50). There are dicta, however, in *Beatson* v. *Skene* (5 H. & N. 838) and *Kain* v. *Farrer* (37 L. T. R. 469) which seem to imply that the privilege must be claimed at the trial by a Secretary of State or the Attorney-General on his behalf. *Hennessy* v. *Wright* (21 Q. B. D. 509) shows that this is not so. It is the bounden duty of the Court itself to interpose, at the trial or on an interlocutory application for discovery, and prevent state secrets being disclosed, whether a Secretary of State appears and objects to production or one of the litigant parties or not. 'Salus reipublicae suprema lex.'

Where does the 'legitimate selfishness' of trade competition end, and that malice begin which turns combination into conspiracy? This was the difficulty in *Mogul Steamship Co.* v. *McGregor* (21 Q. B. D. 544), where a number of shipowners formed themselves into a 'Conference' to secure a monopoly of the homeward tea trade by offering a rebate of five per cent. upon all freights paid by shippers shipping exclusively by the Conference vessels.

The 'Conference' was formed to prevent a so-called ruinous lowering of freights, and was avowedly designed to drive (and did drive) a rival shipowner, who was excluded from the Conference, out of the trade. The Lord Chief Justice found the issue of malice or no malice in favour of the Conference, in the sense that the primary purpose of the defendants was to do good to themselves, not to do harm to the plaintiff. The case was therefore disposed of without much new light being thrown on the dark places of the law of conspiracy and malicious torts.

Not the least unpleasant part of a trustee's duties is to have to take legal proceedings against a near relative or friend. In this respect he is worse off than the prudent man of business managing his own affairs, for he can give no quarter. He must, as the Court of Appeal lay down in *Re Brogden, Billing* v. *Brogden* (38 Ch. Div. 546), be diligent in getting in the trust funds, and if he delays unduly to press for payment and on default to take legal proceedings, he is liable for loss occasioned thereby to the trust estate unless (vain hope!) he can show that legal proceedings would have been fruitless. However, he is not bound to bring an action if he has no funds unless the cestuisque trust will indemnify him (*Tudball* v. *Medlicott*, 36 W. R. 886). A masterly inactivity will not serve him. Thus if he leaves things by arrangement to the acting trustee and the acting trustee commits a breach of trust he can claim no indemnity, for by doing nothing the inactive trustee neglects his duty as much as the acting trustee (*Bacon* v. *Camphausen*, 58 L. T. R. 851). Lord Herschell's new Trustee Relief Bill will, it is to be hoped, do something to brighten the lives of trustees.

Pleadings are not of much importance nowadays, but uniformity is desirable, and from this point of view it is not easy to reconcile *Wood* v. *Durham* (21 Q. B. D. 501) with *Millington* v. *Loring* (6 Q. B. D. 190). The 'material facts' which are to be pleaded under O. 19. r. 4 are not confined to facts which show a cause of action (*Lumb* v. *Beaumont*, 49 L. T. R. 772), but include matters in aggravation of damages; e. g. in a breach of promise action an allegation of seduction (*Millington* v. *Loring*). Then why not matters in reduction of damages, e. g. in an action for libel by a jockey charged with riding unfairly, that the plaintiff had a reputation for 'pulling' horses, and therefore no character to lose? The object of the present system of pleading and particulars, as Lindley L.J. recently observed, is to let the parties know beforehand what case they have to meet, not to leave important facts to be disclosed at the trial.

An infant shareholder seems to be in the same position since the Infants' Relief Act as before it. In *Re Veoland Consols* (58 L. T. R. 922) a director told his clerk, then an infant, that he had put 600 shares in his name. The infant had made no application for the shares, but took no steps for eighteen months after coming of age to have his name removed from the register, by which time a winding-up order had been made; and Stirling J., following *Ebbetts' Case* (5 Ch. 302), held that the ex-infant had precluded himself from repudiating. The Infants' Relief Act was cited in argument, but not dealt with in the judgment. If the case is to be treated as one of ratification within s. 2 of the Act, the Act is clear that no action can be brought on such ratification; in other words, it is 'not enforceable generally' (*Banks* v. *Crossland*, L. R. 10 Q. B. 100). A balance order is certainly a mode of enforcing a contributory's liability none the less that no action can be brought on it (*Chalk Webb* v. *Tennant*, 36 W. R. 263). But is the case within the

Act? The key to that puzzling piece of legislation is to be found in the saving clause in s. 1 restricting its operation to contracts 'such as now by law are voidable.' A contract which is beneficial to an infant is not voidable but binding on him, and therefore outside the Act (*Leslie* v. *Fitzpatrick*, 3 Q. B. D. 229, and the recent case, *Fellows* v. *Wood*, 59 L. T. R. 513). Taking beneficiality as the test, may not the ex-infant's own admission by non-repudiation of the shares be treated as the best evidence of their beneficiality?

A husband's title to his deceased wife's undisposed-of separate property might have been thought matter of elementary law if it had not been gravely disputed by the wife's next-of-kin in *Re Lambert, Stanton* v. *Lambert* (39 Ch. D. 626), and deemed worthy of a careful and learned judgment by Stirling J. As to how the husband derives his title there are three theories: Lord Hardwicke's, that he takes as 'next friend and nearest relation' under 31 Edw. III; Lord Thurlow's, that he takes as next-of-kin of his wife; and Lord Eldon's, that he takes jure mariti. Of his right there is, or was prior to the Married Women's Property Act, 1882, no shadow of doubt. Sec. 25 of the Statute of Frauds expressly provides that nothing in the Statute of Distributions is to extend to the estates of femes coverts. The only thing which gave any colour to the next-of-kin's contention was that, where the wife had under the old law appointed an executor, this displaced the husband's right to administer. Of course! but only as to the property passing under the will; as to what did not, the husband was always entitled to a caeterorum grant. There is nothing in the Married Women's Property Act, 1882, to exclude the husband's right or make the wife's executor a trustee of her undisposed-of separate property for her next-of-kin. The wife is a feme sole for the acquiring, holding and disposing of her separate property, not for its devolution. This was not inadvertence. Where the legislature meant her to be a feme sole as regards devolution, it said so, as in the Divorce and Matrimonial Causes Act, 1857, s. 25. *M'Gregor* v. *M'Gregor* (21 Q. B. Div. 424) and *Aldridge* v. *Aldridge* (13 P. D. 210) put a wife's capacity to contract with her husband on a broad basis. Whenever they can sue one another they can contract, but the true reason of the capacity is in the judgments somewhat obscured under its historical origin. The power to sue and the power to contract are coextensive, not because the power to compromise is an incident of the right to sue, but because the power to sue implies the possession of independent rights.

A sale of goods accompanied by documents such as an inventory and receipt, but good independently of them, is not converted into a bill of sale because such documents are given with it, provided they do not constitute an 'assurance.' Such a sale stands therefore unaffected by the Bills of Sale Acts, which strike at documents, not at transactions (*Manchester S. & L. Railway Co.* v. *North Central Wagon Co.*, 13 App. Cas. 554; 35 Ch. Div. 191; *Newlove* v. *Shrewsbury*, 21 Q. B. Div. 41; *Shepherd* v. *Pulbrook*, 59 L. T. R. 288). Borrowers have not been slow to improve these conclusions of law. Thus in *Redhead* v. *Westwood* (59 L. T. R. 293), *A*, being desirous of borrowing £100, sold his furniture by parole to *B* for £100, *B* by written agreement re-letting the furniture to *A* for a year at a rent of two half-yearly payments of £50 each and £1 for interest. There was no other document. Kay J. held that the Bills of Sale Acts had been successfully evaded, and congratulated the parties on their ingenuity. In *French* v. *Bombernard* (5 Times R. 55), very similar in its facts, the Court took a different, but as between the

two decisions, it is submitted, an erroneous view. *Haydon* v. *Brown* (59 L. T. R. 330) is in accordance with *Redhead* v. *Westwood*. The result is that a borrower has only to make a parole sale of his goods to the lender with a conditional right of repurchase and may laugh at the Acts. The sale must of course be a bonâ fide one (not substantially a mortgage, *Ex parte Odell*, 10 Ch. Div. 76), but its being made with intention to evade the Bills of Sale Acts does not prevent it being bonâ fide. This is something very like the traditional operation of driving a coach-and-six through the Acts, as Bowen L.J. in *North Central Wagon Co.* v. *Manchester S. & L. Railway Co.* foreboded.

Μέγα βιβλίον μέγα κακὸν is emphatically true of the December Law Reports. In all they contain 1027 pages. Why this mass of cases 'alii super alios coacervatarum legum cumuli' is reserved for the last month of the year is a mystery known only to the editors. Thirty-three of the decisions were given in August, thirty-four in July, fifteen in June, and the rest still earlier; not one since the Long Vacation. Comments must therefore be very brief.

In *Boston Deep Sea Fishing Co.* v. *Ansell* (39 Ch. Div. 339) Bowen L.J. makes some very pertinent observations on the too common practice in the commercial world of taking dishonest commissions. The line which divides honest from dishonest commissions is very clearly drawn in law. Not so in business, as cases like the above reveal. All the more necessary is it to emphasize the fact that an agent, from a managing director down to a domestic servant, cannot take a commission on contracts made by him for his principal behind his principal's back.

Morally Mr. Block cannot be commended (13 App. Cas. 570). His case was plainly within the spirit of the Bankruptcy Act, but as plainly not within its letter. A policy enhances the selling value of a life interest, but it is not necessary for the 'realisation' of it.

As no contingency is too uncertain to be incapable of valuation (*Hardy* v. *Fothergill*, 13 App. Cas. 351), so no possibility or expectancy is too vague to be assigned. The assignment binds the conscience of the assignor so soon as the property is ascertained (*Tailby* v. *Official Receiver*, 13 App. Cas. 523). Lord Macnaghten's speech in this case is admirable, both as an exposition of the equitable doctrine and a criticism of the conflicting authorities.

The current of modern authority sets strongly against converting words of wish, desire, or recommendation into precatory trusts. *Re Diggles, Gregory* v. *Edmondson* (39 Ch. Div. 253) is an instance, where the words were 'My desire is that she allow.' Words like these evidently confer an option incompatible with the creation of a trust.

Difficult questions often arise as to how far a contract is tainted with illegality as tending to affect the course of legal proceedings, civil or criminal, but *Lound* v. *Grimwade* (39 Ch. D. 605) seems to have been a very clear case. The bond was given to prevent the obligor's name being mixed up with criminal proceedings, if not to buy off a prosecution.

Lavery v. *Pursell* (39 Ch. D. 508), on which we commented in October

has now appeared in the authorized version. In that case Chitty J. held that a contract for the sale of a house to be pulled down and taken away as building materials was a contract for an 'interest in land' within s. 4 of the Statute of Frauds. It seems proper to mention that, as now reported, the decision seems to have proceeded on the construction of the particular contract. There may be a sale of the house as it stands, with a covenant by the buyer to pull it down and remove the materials. Or there may be a license, coupled with an interest short of possession of the soil, to enter and remove materials which are to become the purchaser's goods as fast as each part becomes goods at all. Chitty J. held that this case was of the former kind. We still doubt whether the decision gave effect to the real intention of the parties; but it is equally doubtful whether the parties had so expressed their real intention that the Court could give effect to it.

In our review of the recent edition of Dart's Vendors and Purchasers, we referred to a then unpublished decision of the Privy Council as being likely, when given to the world, to cause some difference of opinion among legal critics. That case now appears in the December Law Reports, under the name of *Agency Co.* v. *Short*, 13 App. Cas. 793. It appears to have decided that in New South Wales, when a disseisor quits or abandons land of which he has taken possession, having no intention to return, the seisin thereupon revests in the lawful owner without an entry on his part; and therefore that the Statute of Limitations (which in that colony is identical with 3 & 4 Will. IV, c. 27) ceases to run against him, and a new period of its running begins upon the entry of a second disseisor. Probably some of our readers may think that the reason given for this decision is much more open to doubt than the decision itself. We may not improbably attempt some consideration of the case in a future number.

'To say that the Bills of Sale Act (1878) Amendment Act (1882) is well-drawn, or that its meaning is reasonably clear, would be to affirm a proposition to which I think few lawyers would subscribe, and which seems to be contradicted by the mass of litigation which the Act has produced and is producing every day.' These are not the words of a journalist aiming at rhetorical effect, or of a disappointed suitor; they are the first sentence of the judicial opinion delivered by Lord Macnaghten in *Thomas* v. *Kelly*, 13 App. Ca 506, 517.

On Saturday, Nov. 10, Mr. F. Pollock, Sir Henry Maine's successor in the office of Corpus Christi Professor of Jurisprudence in the University of Oxford, delivered a Public Lecture there on Sir Henry Maine and his work. This lecture will shortly be published in the *Contemporary Review*.

CONTENTS OF EXCHANGES.

(The titles of articles in foreign reviews are given in the original, translated, or abridged in English, without any fixed rule, as appears in each case most convenient for our readers.)

The English Historical Review. No. 12. London: Longmans, Green & Co.

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No. 382. The Liability of Trustees—Kant's Philosophy of Law—The Mother's Right of Custody at Common Law and under the Guardianship of Infants' Act, 1886—Conflict of Laws in regard to Marriage and Divorce——The Turfburgh Tragedy—Lawyers and Congress—Number One.

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No. 384. The Progress of the Law of Scotland—Stand up for your rights—De Minimis.

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No. 46. The Execution and Authentication of Writs as affected by the Conveyancing Act of 1874—The Incorporated Society of Law Agents in Scotland.

No. 47. Lord Moncrieff—Obligations at Settlement of Transactions.

No. 48. A hidden volume of Fountainhall—Salvage or Towage?—'Res Perit Domino'—Claims for Compensation in connection with Sewage Schemes.

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Suicide and Legislation (Clark Bell)—The Menopause: its relation to Insanity (T. R. Buckham)—The Medical Jurisprudence of Inebriety—(J. Parrish)—The Scientific Study of Inebriate Criminals (T. D. Crothers)—Personal Responsibility as affected by alcoholic influence (T. L. Wright)—Prohibition and Inebriety (Dr. Mary W. Burnett)—The Possibility of air in the Heart in certain cases of Infanticide (F. W. Higgins)—The Prognosis of Pelvic Cellulitis (W. Thornton Parker).

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La loi du 12 août 1885 et l'assurance maritime (Valabrègue)—De la confusion sur une même tête de la qualité de capitaine et d'armateur (Hornbostel)—English and French Law and Legislation in 1887 (J. G. Alexander and E. Thaller).

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No. 7–8. Esquisse du droit international privé (Bar)—Propriété intellectuelle internationale en Angleterre (Bolt)—Conversion en divorce d'une séparation de corps prononcée à l'étranger (Humblet)—Exécution des jugements français en Alsace-Lorraine (Beauchet)—Influence du mariage de la femme turque sur sa nationalité (Salem)—Droit international privé au Chili (Fabrès).

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La conception populaire de la royauté en Angleterre (E. Boutmy)—La vie municipale en Prusse (M. Leclerc)—De l'organisation des partis politiques aux États-Unis (Ostrogorski)—La politique coloniale de Choiseul (D'Aubigny)—Le budget des grandes routes en France (Zolla).

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Legislatives über die Gestaltung des Erbrechtes (Kohler)— Die örtliche Herrschaft der Anfechtungsnormen nach österr. Rechte (Krasnopolski)—Ueber die Eideszuschiebung: with especial regard to the works of Dr. Gustav Demelius (Fierich)—The new Italian Penal Code (Zanardelli), (Benedikt).

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Die Einheitlichkeit des deutschen Heeres und die Contingentsherrlichkeit (Laband)—Das Preussische und das Reichs-Budgetrecht (Arndt)—Geneh-

migung und subjectives Recht (Gluth)—Zur Theorie des constitutionellen Staatsrechts (Brie)—Die Persönlichkeit des Staates (Preuss)—Das preussische Unterrichtswesen, etc. (Bornhak).

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History of Codification in the German States, and of the preparation of an Imperial Civil Code (Schwartz)—The draft Civil Code and its critics (Ring).

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Le costruzioni giuridiche dell' enfiteusi e le moderne leggi d'affrancamento (Simoncelli)—Il diritto del *bonae fidei possessor* sui frutti (Andreani)—L'ammortamento dei titoli al portatore (Papa-d'Amico)—Di una opinione del professore Ricci (Lordi)—La separazione del patrimonio del defunto da quello dell' erede (Tassi)—The sale of goods in Italian Commercial Law (Straffa)—La storia del diritto romano e le interpolazioni nelle Pandette (Cogliolo)—Review of penal law (Castori).

Rivista Italiana per le Scienze Giuridiche. Vol. VI, No. 1. Rome.

Il destinatario nel contratto di trasporto (Manara)—Il principio del lavoro come elemento di sviluppo di alcuni istituti giuridici (Simoncelli).

Il Filangieri. Anno XIII, Part I, Nos. 9–10. Milan and Naples.

I minorenni delinquenti e il progetto Zanardelli (Conti)—The New Portuguese Code of Commerce (Veiga)—Competenza degli arbitri in rapporto ai terzi (Beltrano)—Two new codes of Commerce; Portugal and Roumania (Franchi).

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La fideiussione considerata nei rapporti del codice civile, coi principî del diritto romano, colla dottrina e colla giurisprudenza (Corsi)—Sulla natura

del diritto del conduttore nel codice italiano (Villa)—Impugnata la costituzione della parte civile nel giudizio penale, deve il magistrato, dopo la sua pronunzia, sospendere quella di merito? (Miraglia).

Themis. Vol. XLIX, No. 4. The Hague.

Nog iets over presidiale bevelschriften tot beslaglegging (Van Manen)—Simplification of Procedure (A. P. Th. Eyssell)—De Kerken der Hervormde Gemeenten in Nederland (J. Reitsma).

Rechtsgeleerd Magazijn. Vol. VII, Part 6. Haarlem.

Early Dutch law texts (Fockema Andreae)—'Crediet-hypotheek' (Wattel)—Some books on Possession (Drucker)—Tradition in practice and terminology (v. Eoneval Faure).

Revista Forense Chilena. Vol. IV, Nos. 1–3. Santiago.

The abolition of slavery in Brazil—Tratado para establecer en América reglas uniformes sobre Derecho Internacional Privado—La reforma del Poder Municipal (J. A. Alfonso)—Don Enrique Cood (Reyes)—These numbers also contain several commentaries and discussions upon the Chilian Codes, Biographical notices, etc.

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The Editor cannot undertake the return or safe custody of MSS. sent to him without previous communication.